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# MASSACHUSETTS REPORTS

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CASES ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS

APRIL 1905 — SEPTEMBER 1905

HENRY WALTON SWIFT  
REPORTER

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**JUSTICES**  
**OF THE**  
**SUPREME JUDICIAL COURT**

**DURING THE TIME OF THESE REPORTS.**

**HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.**

**HON. JAMES MADISON MORTON.**

**HON. JOHN LATHROP.**

**HON. JAMES MADISON BARKER.**

**HON. JOHN WILKES HAMMOND.**

**HON. WILLIAM CALEB LORING.**

**HON. HENRY KING BRALEY.**

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**ATTORNEY GENERAL.**

**HON. HERBERT PARKER.**



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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME JUDICIAL COURT  
OF  
MASSACHUSETTS.

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AMERICAN CAN COMPANY *vs.* COMMONWEALTH.

Suffolk. January 3, 1905. — April 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Tax. Corporation.*

St. 1903, c. 437, § 75, provides that every foreign corporation of certain classes shall pay an excise tax of one hundredth of one per cent on its authorized capital stock, "but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." *Held*, that where one hundredth of one per cent exceeds \$2,000 the amount of the local tax is to be deducted from the whole amount before it is reduced to \$2,000.

PETITION, filed in the Supreme Judicial Court on September 20, 1904, by a corporation organized under the laws of the State of New Jersey, to recover from the Commonwealth the sum of \$1,419.32, the difference between the excise tax paid by the petitioner under St. 1903, c. 437, § 75, and the amount which the petitioner alleged that it should pay under the true construction of that statute.



The respondent demurred to the petition, and the case came on to be heard before *Lathrop, J.*, who reserved it upon the petition and demurrer for determination by the full court. If the demurrer should be sustained the petition was to be dismissed; otherwise, such decree was to be entered as justice and equity might require.

The case was submitted on briefs at the sitting of the court in January, 1905, and afterwards was submitted on briefs to all the justices.

*Asa P. French & J. S. Allen, Jr.*, for the petitioner.

*F. H. Nash*, Assistant Attorney General, *& F. T. Field*, for the Commonwealth.

LORING, J. The only question here is when the limitation of St. 1903, c. 437, § 75, is to be applied which provides that \$2,000 shall be the maximum excise tax laid on foreign corporations.

In the case at bar the authorized capital of the petitioning corporation was \$88,000,000, one hundredth of one per cent of which is \$8,800. Its local taxes were \$1,419.32. The Commonwealth's contention is that the local taxes are to be deducted from \$8,800, making \$7,380.68, which is cut down to \$2,000 by the application of the \$2,000 limitation. The contention of the petitioner is that the excise tax is to be cut down from \$8,800 to \$2,000, and the local taxes are to be deducted then, making the amount to be paid \$580.68.

The argument put forward by the petitioner which goes to the merits is that the deduction of local taxes is to prevent double taxation, as explained by Bigelow, C. J., in *Commonwealth v. Hamilton Manuf. Co.* 12 Allen, 298, 305, and that if the contention of the Commonwealth is adopted and the local taxes are deducted before the \$2,000 limitation is applied, the corporation does not get relief from double taxation in many cases, including the case at bar, for the reason that a corporation with the same authorized corporate stock as the petitioning corporation which pays no local taxes would pay the same excise tax. Inequalities of that or of a similar kind are necessarily incident to a provision limiting the maximum tax to a specified amount. For example, there is a similar inequality in case of a corporation with a capital of \$20,000,000 (one hundredth of one per cent of which is \$2,000) compared with the petitioning corporation with a capital



of \$88,000,000. But the decisive answer to the argument is that if the Legislature had provided in so many words that after the amount of local taxes has been deducted the sum so ascertained should be reduced to \$2,000, it could have done so. In case of such a statute there is a deduction of local taxes to prevent double taxation, and an additional deduction, making the sum to be paid not more than \$2,000 in any event. The question to be decided here is whether that is what the Legislature intended by St. 1903, c. 437, § 75.

It is true that under the Commonwealth's contention the limitation is a limitation on the amount to be paid rather than on the amount to be assessed. On the other hand the petitioner's contention results in transposing the limitation to an earlier part of the section than the part where it appears, and in construing the section as if it had read that every foreign corporation shall pay an excise tax to be assessed by the tax commissioner of one hundredth of one per cent of the par value of its authorized capital and not exceeding \$2,000.

The provisions of the section are such that no construction that can be given to it is altogether satisfactory.

But on the whole a majority of the court are of opinion that the order adopted by the Legislature in the steps specified in the statute is the safer indication of what it had in mind; and that the limitation is to be applied after the local taxes are deducted from the amount ascertained by taking one hundredth of one per cent of the authorized capital of the corporation.

*Petition dismissed.*



**ELDENINE M. YOUNG vs. SANFORD SMALL & others.**

Norfolk. January 25, 1905. — April 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, Contributory.*

A girl nine years of age, who on her way home from school while engaged in playing a game with other children runs across a street without looking to see whether any team is coming and is struck and run over by a team, cannot recover against the proprietor of the team for her injuries whether the driver is negligent or not, as she cannot be found to be in the exercise of such a degree of care as reasonably is to be expected from a child of her years.

TORT, by a girl nine years of age, for personal injuries from being run over by a horse and provision wagon of the defendants on Sagamore Street at or near the corner of Newbury Avenue in Quincy on January 30, 1903. Writ dated April 2, 1903.

At the trial in the Superior Court before *Schofield, J.*, it appeared that the plaintiff was going home from school with other children and that they had been "playing chase" along Newbury Avenue, that the plaintiff and another girl, eleven years of age, took hold of hands and started to run across Sagamore Street, that the boys with whom they were playing had started to chase them again and their purpose in running across the street was to get away from the boys, this being a part of the game, that the plaintiff "was not thinking anything about the team" when she ran across the street, and that before she got half way across the other girl let go of her hand, she was struck by the horse and knocked down and one of the wheels of the wagon ran upon her left leg, so that, as the plaintiff testified, the driver had to "back it off" before he could pick her up.

At the close of the evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

*J. J. Feely & R. Clapp*, for the plaintiff.

*S. H. Tyng & J. W. McAnarney*, for the defendants.

BRALEY, J. The plaintiff, a girl nine years of age, was returning from school with a companion, and they with other children were engaged in playing in the street, through which at



the same time the defendants' team was passing in charge of their servant.

Her testimony showed that she was not giving any attention to the use of the street by others, being entirely absorbed in play, when without looking to see if there were passing teams, or if it was free from obstructions, she deliberately ran across the street, and was struck by the horse and knocked down.

It may be conceded that she had reached an age of sufficient maturity to be allowed to use the public ways to go to and from school without negligence being imputed to her parents, yet she was required to exercise such a degree of care as reasonably was to be expected of a child of her years. *McDermott v. Boston Elevated Railway*, 184 Mass. 126, 128.

But if the plaintiff was lawfully upon the highway, yet her heedlessness in crossing a public street although under momentary excitement, without the least regard to its use at the time by other travellers, exhibits a spirit of carelessness, and a willingness to take chances that prevents her recovery, for it is apparent that if she had looked, the team easily could have been avoided. Such conduct, judged by the ordinary standard of care shown by children of her age, must be deemed to have been negligent, and precludes her recovery. *Messenger v. Dennie*, 137 Mass. 197. *Mullen v. Springfield Street Railway*, 164 Mass. 450. *Morey v. Gloucester Street Railway*, 171 Mass. 164. *Sewell v. New York, New Haven, & Hartford Railroad*, 171 Mass. 302. *Murphy v. Boston Elevated Railway*, post, 8.

No consideration of the due care of the defendants' servant is required, as this negligence on her part is sufficient to sustain the ruling under which a verdict was ordered for the defendants.

*Exceptions overruled.*



**HANNAH A. WADE vs. KATHERINE MILLER.**

Plymouth. January 25, 1905. — April 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Nuisance. Equity Jurisdiction, To enjoin nuisance.*

To determine whether a nuisance exists which will be enjoined in equity the effect of the things complained of upon persons of ordinary health and sensitiveness is to be considered rather than their effect upon those afflicted with disease or an abnormal condition of the nerves.

Keeping a number of hens and two crowing cocks in hen houses and a hen yard maintained in a cleanly condition in the principal village of a country town near or adjoining the dwelling house of another can be found not to be a nuisance entitling the owner of the dwelling house to an injunction to restrain it.

BRALEY, J. This is a bill in equity to enjoin the defendant from maintaining an alleged nuisance that by reason of its nature and proximity impaired the rental value of the plaintiff's property.

The case was referred to a master to whose report no exceptions were taken, and upon whose findings of fact a decree was entered in the Superior Court confirming the report, and dismissing the bill, from which the plaintiff appealed to this court.

From the report it appears that the parties own and occupy contiguous estates situated in the principal village of the town of Bridgewater. There were two dwelling houses on the plaintiff's land, one of which she occupied, and rented the other that was nearest to the homestead of the defendant, who maintained two hen houses, and yard connected therewith, in which a number of hens and not more than two roosters were kept. The plaintiff's claim is that the odor from the houses and yard occasionally became so pungent that, combined with the cackling of the hens and crowing of the roosters, the house occupied by her tenant was rendered uncomfortable as a place of residence.

It is found that the tenant and members of his family, especially his wife, who was a nervous invalid, complained that they were disturbed and annoyed by the odor and noise thus caused, though the plaintiff herself living in a house within a distance



of forty-five feet therefrom was not disagreeably affected to an appreciable extent.

Where the question of a private nuisance is raised, the result produced by it upon persons of ordinary health and sensitiveness rather than upon those afflicted with disease or abnormal physical conditions is to be taken as the criterion.

In the lawful use of property how far an annoyance may be caused to other persons without becoming a nuisance becomes a question of degree. For what may amount to a serious injury to health or the enjoyment of property in one locality by reason of density of population, or the residential character of the neighborhood affected, or the nature of the specific act, may in another place and under different surroundings be deemed proper and unobjectionable.

But in any case if it is sought to prevent by injunction the further continuance of any legitimate business or employment which it is claimed constitutes a nuisance, a real and not a fanciful injury to person or property must be shown. *Davis v. Sawyer*, 133 Mass. 289, 290, 291. *Commonwealth v. Perry*, 139 Mass. 198. *Commonwealth v. Packard*, 185 Mass. 64, 66.

The defendant had a right to the lawful use and enjoyment of her premises, and this would include the keeping of hens in houses, and a yard used for that purpose, which are shown by the report to have been maintained in a cleanly condition, and cared for in such a manner as not to injuriously affect the health of any normal person living in that neighborhood.

Although the odor arising from the hen houses and yard, which at times was accompanied by the characteristic cry made by their occupants, may have been unpleasant, it does not appear by the report to have been physically uncomfortable or unbearable.

Indeed the findings of fact fail to show that the conditions existing on the premises of the defendant were abnormal, or differed substantially from those usually found in the country where the ordinary incidents arising from keeping barnyard fowls are not considered extraordinary, or peculiarly irritating even to sensitive persons. *Rogers v. Elliott*, 146 Mass. 349, 353. *Downing v. Elliott*, 182 Mass. 28, 29.

*Decree affirmed.*

*D. T. Devoll*, for the plaintiff.

*C. A. McLellan*, for the defendant.



CATHERINE MURPHY, administratrix, vs. BOSTON ELEVATED  
RAILWAY COMPANY.

Suffolk. March 7, 1905. — April 4, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Negligence, Contributory. Street Railway.*

If a bright, intelligent boy five years and four months of age, sent on an errand which requires him to cross a street on which electric cars frequently are passing in both directions, having no reason for haste and when a car in plain sight is one hundred and twenty feet distant coming toward him with great speed, leaves the curbstone at a cross walk which he does not follow and taking a diagonal course goes at a gait faster than a walk to a point between the rails, and then attempts to dodge but is run over and killed by the car, in an action under Pub. Sts. c. 112, § 212, against the railway company for causing his death by the gross carelessness of its servants, it cannot be found that the boy exercised the degree of care reasonably to be expected from children of his age, and the action cannot be maintained.

TORT, under Pub. Sts. c. 112, § 212, for causing the death of the plaintiff's intestate run over by a car of the defendant on Centre Street in that part of Boston called Roxbury on November 14, 1900, through the alleged gross negligence and carelessness of the defendant's servants. Writ dated February 23, 1901.

At the trial in the Superior Court *Maynard*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*T. H. Dowd*, for the plaintiff.

*C. F. Choate, Jr.*, for the defendant.

BARKER, J. The plaintiff's intestate, a boy five years and four months of age, bright, intelligent and well developed for his years, lived on New Heath Street near Centre Street in the Roxbury district. He had travelled on the street cars and knew Centre Street and knew there were two street railway tracks there upon which the cars ran frequently, in both directions. He had been sent on errands before November 14, 1900. On that day he was sent on an errand to Highland Street which leads off from Centre Street some distance southerly from New Heath Street. To do the errand he must cross Centre Street. In attempting to cross he was run over by a car of the defend-



ant and killed. At the place where the child left the curb to cross Centre Street the nearest rail was sixteen feet from the curb, and the overhang of the car was two feet. There was nothing to obstruct his view of the car which was approaching on a down grade of five per cent at a speed variously estimated as from twelve to twenty miles per hour. Two brewery teams which had been moving in the same direction with the car on its track had just swung out to the other track to allow the car to pass them. The street was quiet with nothing to attract the boy's attention but the car and the two brewery teams.

The evidence consisted of a plan and the testimony of an engineer explaining the plan, the testimony of a foot traveller who was walking on the sidewalk near by and saw the accident, that of the driver of the first brewery team, who does not seem to have seen the boy until after the accident, and of the testimony of the mother of the boy and of the person with whom he was living and who had sent him upon the errand. Neither of these two witnesses last mentioned saw the accident or knew of it until afterwards. In addition a medical examiner testified that the boy was killed in consequence of the crushing of his skull. The judge ruled that upon all the evidence the plaintiff could not recover, and the case is here upon an exception to that ruling.

The only evidence of gross negligence on the part of the defendant's servants is that as to the speed of the car, and that as the car passed the brewery teams the motorman turned his head in their direction, which was to turn it away from the sidewalk, and that no gong was sounded. We assume without so deciding that the question whether the motorman was grossly negligent was for the jury. We are of opinion that upon the evidence the jury could have found that the person with whom the boy was living was not negligent in sending him unattended upon an errand which required him to cross Centre Street. *Lynch v. Smith*, 104 Mass. 52, 56. Whether the ruling excepted to was right depends upon whether it could be found as a reasonable inference from the evidence that the plaintiff had sustained the burden of proving that the boy in attempting to cross the street at the time and place and in the manner in which he did attempt it when he left the curb was in "the exercise of that degree of



care which may reasonably be expected of children of his age, or which children of his age ordinarily exercise." *Collins v. South Boston Railroad*, 142 Mass. 301, 314, and cases cited. *McDermott v. Boston Elevated Railway*, 184 Mass. 126, 127. If a child of sufficient age and capacity to be allowed properly to travel unattended in a public way used in part by electric cars, is injured by a collision in the street, it is contributory negligence on his part if he unreasonably, intelligently and intentionally ran into the danger, even if children of his age often are reckless. *Collins v. South Boston Railroad*, 142 Mass. 301, 315. *Hayes v. Norcross*, 162 Mass. 546, 548.

In the present case the danger of being run over by an electric car in crossing Centre Street must be taken to be one which the plaintiff's intestate knew, and which he ought to have had in mind, and he could not rightly be found to have been in the exercise of due care unless it could be found reasonably from the evidence that he exercised some care and forethought to avoid that danger.

We think no such inference properly could be drawn from the evidence. There was nothing in the street to attract his attention except the two brewery teams and the approaching car. There was nothing to call upon him to make haste, and he could choose his own time and place for crossing Centre Street. He left the curb at a cross walk which he did not follow but took a diagonal course. The car was in plain sight. When he left the curb the car was but one hundred and twenty feet distant and was coming with speed. He started from the curb at a gait faster than a walk and went in a straight course to a point between the rails, and then attempted to dodge. The whole distance from the point at which he started to run from the curb to the spot where he was struck was only sixteen or eighteen feet. The witness who saw the occurrence testified that it was all over in an instant, that the boy seemed to start all of a sudden and run right there, and that the witness did not have time to call to him.

Having no reason for haste, or for attempting to cross Centre Street at that point rather than another, there is nothing in the circumstances disclosed by the evidence to show that the boy exercised any care whatever for his own safety, until he was



between the tracks in front of the car and the collision was inevitable. *Morey v. Gloucester Street Railway*, 171 Mass. 164. See also *Hayes v. Norcross*, 162 Mass. 546 ; *Mullen v. Springfield Street Railway*, 164 Mass. 450.

*Exceptions overruled.*

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SADIE A. RYAN vs. AGRICULTURAL INSURANCE COMPANY.

Suffolk. March 9, 1905. — April 4, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Insurance, Fire.*

Under a policy of fire insurance in the Massachusetts standard form, one holding a chattel under a contract of conditional sale, by which the title is to pass when all instalments of the purchase money have been paid and in the meantime the purchaser is "to be held liable for loss or damage by fire or otherwise," if the chattel is destroyed by fire, may recover not only the amount of the instalments he has paid but also the amount of his liability in consequence of the destruction of the chattel by fire.

CONTRACT on a policy of insurance against fire in the Massachusetts standard form on household furniture and other personal effects including a piano. Writ dated April 29, 1904.

At the trial in the Superior Court before *Hardy, J.*, without a jury, it appeared that on January 26, 1904, while the policy was in force, a piano and other articles of personal property were destroyed by fire while in the possession of the plaintiff in the house designated in the policy. The plaintiff put in evidence a contract of conditional sale under which she received the piano and used it until it was destroyed by fire. The price of the piano was \$275, of which the plaintiff at the time of the fire had paid \$71.

The contract was as follows: "This agreement entered into on the 24th day of June, 1903, by and between Frank L. Barnard, of Boston, Mass., as Lessor, and Mrs. David Ryan of Jamaica Plain, Mass. Witnesseth, That the said Lessee has received of the said Frank L. Barnard, one Carlisle piano, mahogany, No. 30810, one stool, one scarf. Said property to be located at 17 Sheridan Street, and not to be removed without the consent of



the said Frank L. Barnard, in writing, the Lessee to be held liable for loss or damage by fire or otherwise; and the Lessee hereby agrees to pay to the said Frank L. Barnard the sum of two hundred and seventy-five dollars (\$275.00) with interest at six per cent per annum on unpaid balances, as follows: \$48.00 (receipt acknowledged) paid on a former lease by Rose M. Halleren. And then \$1.00 on Wednesday of each succeeding week until paid in full. The said Frank L. Barnard will not hold himself responsible for any agreement unless written or printed on face of this lease. And it is agreed, that on the payment of the above named amount in full, the said Frank L. Barnard shall execute a good and sufficient bill of sale of said property to said Lessee; but until such payment in full, it is agreed and understood that it is, and shall remain, the property of said Frank L. Barnard; that in case of failure on the part of the said Lessee to fulfill any part of this agreement, said Frank L. Barnard shall have the right to take immediate possession of said property without any legal proceedings. The Lessee acknowledges receiving a copy of this lease. Mrs. David Ryan. Frank L. Barnard."

At the close of the evidence the plaintiff asked the judge to make the following rulings: 1. That the plaintiff had an insurable interest in the piano to its full value. 2. That the loss on the piano was its reasonable value. 3. That the plaintiff was entitled to be put in the same condition pecuniarily in which she would have been if there had been no fire.

The judge refused to rule as requested, and made the following findings: "I find that the plaintiff in procuring insurance upon the property in her own name, had no intent to deceive the defendant or to withhold any facts material to the risk; that the title to the piano was in Barnard, and that the plaintiff had no insurable interest therein other than the interest she had acquired by the assignment and payment to the amount of \$71 of the instalments due on the contract of sale."

The judge found for the plaintiff in the sum of \$196.88, allowing for the loss of the piano only \$71, the amount of the instalments paid by the plaintiff. The plaintiff alleged exceptions.

*F. A. Appleton*, for the plaintiff.

*G. S. Selfridge*, for the defendant.



KNOWLTON, C. J. The principles applicable to this case were discussed in *Tabbut v. American Ins. Co.* 185 Mass. 419, and the facts in the two cases are almost identical. There is one important difference between them, affecting the interest of the plaintiff and the amount for which the defendant is liable. In that case, as in this, the plaintiff "had a possessory right, founded on a conditional sale, with the privileges pertaining to it which are given by the R. L. c. 198, §§ 11-13." Upon the facts agreed, and in the absence of anything to show that her right was otherwise valuable, it was held that she could recover only the sums that she had paid as a part of the price of the property, together with interest thereon.

In the present case the contract contains an additional stipulation, namely, that the lessee is "to be held liable for loss or damage by fire or otherwise." Inasmuch as the plaintiff is liable to the owner under her contract for the destruction of the piano by fire, her insurable interest as a vendee under a conditional sale extends not only to the amount of her advancements towards the purchase, but also to her liability for the possible destruction of the property by fire.

The rulings requested should have been given. See *Phoenix Ins. Co. v. Erie & Western Transportation Co.* 117 U. S. 312, 323; *Doyle v. American Ins. Co.* 181 Mass. 139.

*Exceptions sustained.*

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### COMMONWEALTH vs. JAMES LAVERY.

Suffolk. March 20, 1905. — April 4, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Common Victualler. License. Words, "Assume", "Presume."*

On the trial of a complaint under R. L. c. 102, § 1, for assuming to be a common victualler without being licensed, if it appears that the defendant caused a license to be procured in the name of another person and assuming to act under such license carried on a restaurant for his own profit and not as agent or servant of the licensee, he can be found to be guilty under the statute, although he honestly believed that he had a right to conduct the business in this way, an intention to violate the law not being necessary to the commission of the offence.



BRALEY, J. This is a complaint under the R. L. c. 102, § 1, charging the defendant with assuming to be a common victualler without first obtaining a license as required by other provisions of this chapter. At the trial in the Superior Court the jury returned a verdict of guilty, and the case is before us on his exceptions to the refusal of the court to rule as requested, and to the instructions given to the jury.

The lodging and entertainment of strangers and travellers for gain, or the keeping of a place where they may purchase food, are carefully regulated by statute, which makes it unlawful for any one to engage in these employments without first obtaining a license.

In any case the licensing board is given discretionary power to grant or refuse an application made for this purpose, and the requirements that the license shall specify the place by a sufficient description, that the premises shall be provided with suitable facilities, and that when the licensee ceases to exercise his employment or fails to maintain his establishment properly his license shall be revoked, clearly contemplates a careful selection of the person to whom such a privilege is granted. It thus becomes personal in its nature, and is not capable of being transferred by the licensee, nor does the license furnish immunity from prosecution to another who seeks to avail himself of its benefit as if it had been originally granted to him. R. L. c. 102, §§ 1, 2, 3, 5, 6 and 9.

The provision found in § 1 is a re-enactment of the law as it appears in the Gen. Sts. c. 88, § 1, and the Pub. Sts. c. 102, § 1, with the exception that the word "assume" is substituted for "presume," used in these revisions.

Whatever difference there may be in the meaning of the words when contrasted with their etymological origin shown by lexicographers, they have acquired by long usage a synonymous definition when used in this connection in our statutes. See also St. 1786, c. 68, § 1; Rev. Sts. c. 47, § 1.

Whoever assumes to be a common victualler without a license may be said to take the position of falsely representing himself as lawfully engaged in such occupation, while if he appears by his conduct to be so employed, he thereby indicates to the public generally that it may be presumed that he is carrying on



the business thus indicated. *Commonwealth v. Wetherbee*, 101 Mass. 214. *Martin v. Bowker*, 163 Mass. 461, 462.

The evidence undoubtedly showed that the license in the present case had been issued in the name of one Miller, covering the premises where it was contended that the defendant conducted a restaurant, and if the defendant was employed by Miller as his servant or agent, he would not be assuming to act as owner nor guilty of a violation of the statute.

But there was undisputed testimony that the defendant paid the rent, hired the help, and supplied and paid for the provisions used, while this was supplemented by admissions made by him that he was the owner of the "lunch room", and was conducting it for his own benefit.

It further appeared that being financially embarrassed he had endeavored to make a settlement with his creditors, and to prevent attachments by them had made deposits of money in a savings bank in the name of his sister, and it was contended by the government that the license was taken and the business ostensibly carried on in the name of Miller for a similar reason.

The defendant, who was a witness in his own behalf, though contending that he was the manager while Miller was the proprietor, stated that at the time alleged in the complaint he had sole charge and a considerable interest in the business, which he believed was lawfully being conducted under the license.

It thus became an issue of fact whether he was acting in any capacity under Miller as a principal, or whether he was engaged in the enterprise for himself. *Commonwealth v. Williams*, 161 Mass. 442, 443. *Commonwealth v. Woods*, 165 Mass. 145.

In full and clear instructions the jury were told correctly that if they believed the defendant was not the proprietor and only acted in a subordinate capacity, he should be acquitted, but if they found he was actually engaged in carrying on the place for his own profit, then the license would not protect him, and he would be guilty of the offence charged.

But the defendant urges that these instructions were erroneous, and the jury should have been further instructed, in accordance with his requests, that a criminal intent must be proved, and if they found he honestly believed that he had a right to conduct business in this way he was innocent.



This position is not well taken. Under laws passed in the exercise of the police power, amongst which this statute must be classed, acts which before their passage may have been innocent and lawful can be made criminal, while violations of such enactments become punishable without proof of a wicked purpose or evil intention on the part of the wrongdoer. *Calder v. Kurby*, 5 Gray, 597, 598. *Commonwealth v. Plaisted*, 148 Mass. 375, 382, 383. *Commonwealth v. Packard*, 185 Mass. 64, 67. *Commonwealth v. Julius*, 143 Mass. 132. *Commonwealth v. Daly*, 148 Mass. 428. R. L. c. 218, § 29.

*Exceptions overruled.*

*H. S. Dewey*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth, submitted a brief.



ANNIE J. CROCKER, executrix, vs. GEORGE U. CROCKER  
& others.

Suffolk. December 8, 1904. — April 5, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Equity Pleading and Practice. Probate Court, Appeal.*

Probate appeals are on the equity side of the court and are governed by the rules of practice in equity so far as they are applicable.

When on an appeal from the Probate Court issues are framed for a jury by a justice of this court the verdict of the jury if not set aside by the justice is conclusive upon the issues of fact.

APPEAL from a decree of the Probate Court for the county of Suffolk allowing the will of Uriel H. Crocker, late of Boston.

The case at first came on to be heard before *Lathrop, J.*, who ordered that the following issues should be tried by a jury:

"First. Was the instrument propounded for probate as the last will of Uriel H. Crocker, deceased, executed according to law?

"Second. Was the said Uriel H. Crocker of sound and disposing mind and memory at the time of the execution of the said instrument?



"Third. Was said alleged will procured to be made through the fraud or undue influence of Annie J. Crocker?"

At a trial of these issues, the jury answered the first question in the affirmative, and disagreed upon the second and the third issues. Thereafter the same justice ordered that a second trial by jury should be had upon the second and third issues. At the second trial before *Braley, J.* the jury returned a verdict answering the third issue in the affirmative. Thereafter a motion was made on behalf of Annie J. Crocker that the court set aside the verdict and order a new trial, or that the cause stand for further hearing and the will be approved and allowed by the court. This motion was denied by *Braley, J.*, who made a decree that the decree of the Probate Court allowing the will be reversed, that the will be disallowed, and that the case be remanded to the Probate Court for further proceedings. Annie J. Crocker appealed. She also made motions for the reporting of the evidence which were denied by the single justice as stated in the opinion of the court.

The case was argued at the bar in December, 1904, before *Knowlton, C. J., Morton, Lathrop, Barker, & Loring, JJ.*, and afterwards was submitted on briefs to all the justices.

*J. H. Benton, Jr., (A. F. Clarke with him,)* for the appellee.

*R. M. Morse & W. D. Turner,* for the appellants.

KNOWLTON, C. J. After a verdict of a jury in the Supreme Judicial Court, by which they affirmed that the alleged will presented for probate was "procured to be made through fraud or undue influence," the person named as executrix moved to set aside the verdict on the ground that it was against the law and the evidence. The last part of the motion was that, if the verdict is not set aside, "the cause stand for further hearing before the court, and the will be approved and allowed by the court, notwithstanding said verdict and answer to the third interrogatory." This motion was denied after a hearing, and a decree afterwards was entered setting aside the will and remanding the case to the Probate Court. At the hearing on this motion no request was made to report the questions raised by the motion, nor the facts, nor the evidence, if the decision thereon should be adverse to the executrix. The motion was denied on July 13, 1904, and the decree was entered on September 7, 1904. On



September 8 the executrix requested a report to the full court of all the evidence introduced at the trial, and on September 9 she requested in writing a report of facts to the full court, under the provisions of R. L. c. 159, § 23. An appeal was taken from the final decree, and on November 4, 1904, by leave of court, motions in writing were filed for an order reporting to the full court the evidence taken by the official stenographer at the trial, and for an order to be entered *nunc pro tunc*, appointing the official stenographer who took the evidence a commissioner to report it under the rule of court. These motions were denied by the single justice on the ground that he had no power to grant them, and the judge has reported the questions arising upon them to this court. The executrix at the same time entered an appeal from the denial. It appears by the report that the justice, in dealing with the motion for a new trial, found that the case had been thoroughly and fairly tried, and that there was substantial evidence to support the finding of the jury. A decree was entered in conformity with the verdict of the jury, and no additional material facts were found for the purpose of ordering the decree.

The appellant relies upon the rule of practice in equity cases in the English courts and in some of the courts of this country, to treat the verdict of a jury upon issues of fact, in a suit in equity or a probate appeal, as not necessarily conclusive upon the matters decided, but as a part of the proceedings, to be given weight or not, as the judge may think proper in making his decree. But a different practice has prevailed and has become well established in this Commonwealth. In *Franklin v. Greene*, 2 Allen, 519, the principal point decided relates to issues of fact submitted to a jury in a suit in equity, and, referring to the procedure in such cases, Mr. Justice Chapman says in the opinion: "When a verdict is rendered, and not set aside for good cause shown, it will be regarded as settling the facts in issue conclusively." The rule thus established has been followed uniformly ever since. In *Burlen v. Shannon*, 99 Mass. 200, Mr. Justice Foster, after referring to the practice in England and in many American courts, in probate appeals and in suits in equity, to treat a verdict without setting it aside as not binding upon the judgment of the court, says, "This practice has never been



sanctioned by the usage of our own courts," and cites *Franklin v. Greene*, 2 Allen, 522. Chief Justice Gray, in *Ross v. New England Ins. Co.* 120 Mass. 118, 117, uses these words: "If an issue is ordered to be tried by a jury, their verdict is conclusive upon that issue, unless set aside by the court for good cause shown. *Franklin v. Greene*, 2 Allen, 519. *Ex parte Morgan*, 2 Ch. D. 72. The court, in the exercise of its discretion, should not order such a trial, unless it is satisfied that the issue is one which can be more satisfactorily tried by a jury than by the court." The opinion by Chief Justice Field in *Langmaid v. Reed*, 159 Mass. 409, contains this language in reference to issues in equity: "The findings of the jury, not having been set aside, must be taken as true. *Franklin v. Greene*, 2 Allen, 519. The justice who finally heard the cause could, however, find on the evidence before him any other material facts not inconsistent with these findings." The same proposition, in substance, is stated by Mr. Justice Barker in the opinion in *Dudley v. Dudley*, 176 Mass. 84, a part of which is in these words: "When issues of fact are submitted to a jury in an equity suit, and a verdict is rendered upon the issues and is not set aside, the verdict is regarded as settling the facts so put in issue. The verdict is conclusive upon those issues." As applied to most suits in equity, one of the reasons given for the rule in *Franklin v. Greene*, *ubi supra*, is not in accordance with the later decisions of this court. *Parker v. Simpson*, 180 Mass. 334, 355. To another class of suits it is applicable. See *Powers v. Raymond*, 137 Mass. 483. This fact does not affect the validity of the rule itself, which rests upon sound principles, and is supported by an unbroken series of decisions.

Probate appeals, both by statute and decision, are upon the equity side of the court, and are governed by the rules of practice in equity, so far as they are applicable. Gen. Sts. c. 113, § 14; c. 117, § 14. Pub. Sts. c. 151, § 14; c. 156, § 11. R. L. c. 162, § 15; c. 159, § 20. The statute authorizing the making of rules for practice in equity cases was held to include probate appeals. Gen. Sts. c. 113, § 26. *Wright v. Wright*, 13 Allen, 207, 209. By Rule 37 of the Supreme Judicial Court in Chancery, found in 14 Gray, 360, it is provided that, "The foregoing rules [being all of the rules in chancery] shall apply to hearings upon probate



appeals, so far as the same are applicable thereto." Among these is the rule in regard to the trial of issues by a jury. The same rules are still in force. Chancery Rules of the Supreme Judicial Court, 36, 38, 136 Mass. 609, 610. The cases which refer to the practice in equity and probate appeals treat them together, as if governed by the same principles. *Wright v. Wright*, *ubi supra*. *Mason v. Lewis*, 115 Mass. 334, 335. *Green v. Hogan*, 153 Mass. 462. See *McKay v. Kean*, 167 Mass. 524, 528, a probate appeal in which the subject of issues to a jury is considered at length. In *Shailer v. Bumstead*, 99 Mass. 112, 131, and *Newell v. Homer*, 120 Mass. 277, 281, Mr. Justice Colt includes probate appeals and equity cases in the same proposition, when he says of the findings of the jury, "They may be disregarded in whole or in part if on the final hearing they are not deemed important, or new issues may be framed from time to time and submitted if the rights of the parties may seem to require it." But he does not intimate, if they are relevant or important when the case takes shape at the final hearing, that they can be disregarded, so long as they are allowed to stand. He had previously stated in the same opinion, that "in the matter of framing issues, proceedings in probate appeals are conducted in accordance with the rules and practice in equity."

There is no good reason for a different rule in the trial of issues to a jury in a probate appeal from that which applies to suits in equity. In this respect, so far as we have known, the practice in this Commonwealth has been uniform. Issues are framed only in cases which present questions of fact peculiarly proper for determination by a jury. When such issues are framed, and until they are disposed of by the court, they carry with them the ordinary methods of trial by jury in an action at common law. The verdict may be set aside for good cause, as a verdict may in an action at law. Whether the issues are in an ordinary suit in equity or in a probate appeal, the judge, in dealing with a motion for a new trial, exercises his discretion, as he does in an action at common law. *Perry v. Shedd*, 159 Mass. 200. *Capper v. Capper*, 172 Mass. 262. But if the verdict is allowed to stand, it is a determination of the facts in issue by the tribunal which was chosen by the court, because of its peculiar fitness, to deal with them. Our statutes expressly author-



ize the courts to frame issues of fact to be tried by a jury. R. L. c. 159, §§ 36, 38. Trial by jury in this Commonwealth has always been considered a valuable constitutional right, in the cases in which the right exists. When the Legislature expressly provides for it in suits in equity, the statute has been assumed by the court to mean a trial by jury which shall be of effect to settle the rights of the parties in regard to the matters determined by the jury.

In many cases it would be impracticable to apply the appellant's proposed rule, and it would be difficult in all cases. Issues may be sent to the Superior Court for trial. R. L. c. 159, § 36; c. 162, § 25. The judge of that court has no jurisdiction except to try the issues framed by the Supreme Judicial Court. He may set aside the verdict if there is ground for it, but he can do nothing else but transmit the verdict to the Supreme Judicial Court. There is no provision for a report of the evidence from the Superior Court to the Supreme Judicial Court. The testimony taken by the official stenographer of the Superior Court may be used in different ways under the statute, but it has no place in the Supreme Judicial Court upon a hearing of facts before a justice there. R. L. c. 165, § 85. Upon the appellant's theory, the justice of the Supreme Judicial Court might be called upon to hear all the evidence *de novo*, disregarding the verdict, and then to have it reported for the full court, to be used on an appeal to that court. Nothing would be gained by a trial of issues to a jury under such a practice.

We are of opinion that the justice could not properly enter a decree at variance with the finding of the jury, so long as their verdict was allowed to stand.

If the decision of this question were different, it would not follow that the motions of the appellant, filed a long time after the entry of the final decree, should have been granted. There are other good reasons why they should have been denied, which we need not consider.

All of the justices agree in the conclusion reached but a minority of the court do not agree with the reasoning.

*Decree affirmed.*



SARAH J. LARKIN, administratrix, vs. KNIGHTS OF  
COLUMBUS.

Suffolk. March 8, 1905. — April 5, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Fraternal Beneficiary Association. Statute, Construction.*

The charter of a fraternal beneficiary association, incorporated by a special law of another State, contained a provision that the beneficiary of a certificate should be specified only in the following order, (a) such person or persons of the immediate family of the member as by him designated, (b) such persons, in default of such family, of the blood relatives of the member as by him designated, (c) in default of any designation by the member, "or out of the order named," aid should be rendered by the corporation to such family or relatives of such member, "in manner above named." A member, being unmarried and living apart from his father and other relatives, designated his father as beneficiary. Later he married, and his wife was a member of his family until his death. He made no change in the designation. On his death the corporation paid the amount due on the certificate to his widow under a rule of the order made to carry out provision (c) of the charter. *Held*, that the payment was lawful, the provision in the charter for payment by the corporation in case of a designation "out of the order named" applying to a designation which originally was permitted but which by reason of the member's marriage and the consequent change in his family was at the time of his death a designation out of the order named.

In the construction of a special charter granted by the legislature of another State, an interpretation made by the highest court of that State is entitled to great consideration if not absolutely conclusive on this court.

CONTRACT by the administratrix of the estate of James Larkin, late of New Bedford, on a benefit certificate for \$1,000 issued by the defendant on the life of Thomas J. Larkin, late of New York, son of the plaintiff's intestate, alleged to have been payable to the plaintiff's intestate. Writ dated May 9, 1904.

The Superior Court upon an agreed statement of facts gave judgment for the defendant; and the plaintiff appealed.

*W. Burns & J. F. Lynch*, for the plaintiff, submitted a brief.

*J. E. McConnell*, for the defendant.

KNOWLTON, C. J. The question in this case is which of two claimants is entitled to the amount due from the defendant, a fraternal beneficiary society, under a benefit certificate issued to the son of the plaintiff's intestate. The defendant was chartered



by a special law of Connecticut, and the statement of agreed facts shows that the purposes for which it was incorporated were,

"1. Of rendering pecuniary aid to its members and beneficiaries of members, which said aid shall be exempt from attachment and execution while in possession or control of such corporation, members or beneficiaries, which said beneficiary shall be specified only in the following order, to wit:

"(a) To such person or persons of the immediate family of said member as by him designated.

"(b) To such person or persons in default of such family of the blood relatives of such member as by him designated.

"(c) In default of any designation by said member, or out of the order named, except by the permission of the board of directors or their successors, for cause shown, then said aid shall be rendered by said corporation to such family, or relatives who are heirs at law of such member, in manner above arranged, upon their proof of being of such family or such heirs at law."

These are the only portions of the charter which are before us. A law and rule of the order provides for the change of the beneficiary, which can be made only in accordance with the laws of the order. Another law and rule of the order provides that, if a member in good standing dies without having designated a beneficiary, or if "the designation of the beneficiary is contrary to the provisions of the charter, or the beneficiary designated has died, then the board of directors, upon the advice of the national advocate of the order, shall determine to whom said sum shall be paid; provided, however, that in all cases the beneficiaries shall not be in conflict with the provisions of the charter of the Knights of Columbus."

When the certificate was issued, the member was unmarried, and was living away from his father and his other relatives, so that there was no one who was of his immediate family within the meaning of provision (a). He therefore designated his father as his beneficiary under provision (b). Afterwards he married, and his wife was a member of his family until his death. No change was made in the designation. After his death the defendant, under the rule last quoted, paid the amount due under the certificate to his widow. The question is, whether



his father was entitled to it under the designation, or whether the corporation had a right to pay it to the widow.

The designation originally was proper according to the terms of the charter. After his marriage, while his wife was a member of his family, such a designation could not have been made. The precise question is, whether the words "out of the order named," in provision (c), apply to a designation which, by reason of a change in the family of the member, has ceased to be in the order named, or includes only cases in which the designation was "out of the order named" at the time when it was made.

In view of the purposes of most organizations of this kind, it has been held in some cases that the rights of claimants depend upon the status at the date of the member's death. *Tyler v. Odd Fellows' Relief Association*, 145 Mass. 134, 136. *Sargent v. Knights of Honor*, 158 Mass. 557. *Knights & Ladies of Honor v. Menkhause*n, 106 Ill. App. 665.

We think the words susceptible of an interpretation which sets aside the designation, if out of the order named when applied to the member's family as it is at the time of his death. The case of *Knights of Columbus v. Rowe*, 70 Conn. 545, is almost identical with this case, and it was there held, without any statement of the reason for this part of the decision, that the widow of the member was entitled to the benefit, instead of his father, who was designated as the beneficiary before the marriage. This construction of a statute of Connecticut by the Supreme Court of that State is entitled to great consideration, if it is not absolutely conclusive upon us. We are therefore of opinion that the payment to the widow was authorized by the charter.

*Judgment affirmed.*



**GEORGE E. BATCHELDER, trustee, vs. CENTRAL NATIONAL  
BANK OF BOSTON.**

Suffolk. December 7, 1904. — April 7, 1905.

Present: **KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.***Bank. Trust.*

The fact that a trustee deposits a check payable to him as trustee in his personal account at a bank where he has no account as trustee gives the bank no reason to believe that the trustee is acting dishonestly, and if the trustee fails to account for the proceeds of the check the beneficiary has no remedy against the bank.

**BILL IN EQUITY**, filed in the Supreme Judicial Court on May 12, 1902, by the trustee under the will of Allen F. Gray, late of Lynnfield, alleging that one Waterman, the predecessor of the plaintiff as trustee, sold certain property belonging to the trust and received in payment a check for \$4,020.63 payable to Waterman as trustee, that Waterman indorsed this check as trustee and deposited it in his individual account in the Central National Bank of Boston, the defendant, and that thereafter Waterman departed to parts unknown and failed to account for the proceeds of the check; praying that the defendant might be adjudged a trustee for the plaintiff to the amount of the proceeds of the check, with interest from the date of demand by the plaintiff.

The case was heard by *Loring, J.*, whose memorandum of decision contained the following:

"I do not think that the bank in this case was a party to a fraud. To charge the defendant on the ground that it was a party to a fraud, the plaintiff must at least go so far as to prove that the defendant had reason to believe that Waterman was acting dishonestly.

"I do not think that the plaintiff has sustained the burden of proving that fact. The bank knew that Waterman deposited this check belonging to the trust in his individual account. But so far as appears he had no other account, and the bank might



have thought that he used this account to collect the check as a matter of convenience."

The justice ordered that the bill be dismissed, and at the request of the plaintiff reported the case for determination by the full court, such decree to be entered as equity and good conscience might require.

*M. E. S. Clemons*, for the plaintiff.

*F. D. Allen*, (*W. L. Van Kleeck* with him,) for the defendant.

BARKER, J. The short answer to the plaintiff's case is the finding that he has not sustained the burden of proving that the bank had reason to believe that Waterman was acting dishonestly. The bank was not a creditor of his, and the only deposit account he had with it was one to his personal credit. The bank had no other knowledge even that he held any trust than such as it might have inferred from the fact of the form of the check. Under those circumstances it cannot be ruled as matter of law that for him to deposit to his personal account funds which he took as trustee was a dishonest act on his part, or that the circumstance that the check so deposited was one payable to his order as trustee gave the bank reason to believe that the depositor was acting dishonestly. The circumstances were much less significant than those under consideration in *Ashton v. Atlantic Bank*, 3 Allen, 217, and which there were held not to afford a sufficient presumption of knowledge that the trustee was acting in violation of duty to create a liability on the part of the bank. We could not reverse the decision of the justice who heard the present case without in effect overruling the case cited.

The plaintiff relies upon *Duckett v. National Mechanics' Bank*, 86 Md. 400. So far as that case charges the defendant bank, it seems to us to do so upon the ground that the bank credited to the personal account of a depositor funds which it was ordered to credit to his account as trustee. In the same case the court refused to charge the bank with another check in fact belonging to the same trust, but which it was ordered to credit to the same person, without more. We do not read the case as holding that mere knowledge on the part of a bank that trust funds stand to the credit of a depositor's personal account must charge the bank with knowledge that the depositor is acting dishonestly.



Nor if it should be so read could we follow it. See *Safe Deposit & Trust Co. v. Diamond National Bank*, 194 Penn. St. 334.

Upon the report a decree should be entered dismissing the bill with costs.

*So ordered.*

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WILLIAM R. KERR vs. AMERICAN PNEUMATIC SERVICE  
COMPANY.

Suffolk. March 8, 1905. — April 7, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Contract, Validity.*

A contract made by a pneumatic service company to employ a person for five years as its agent in attending to government and franchise matters at a salary of \$7,200 a year and reasonable travelling expenses, but agreeing that when the contracts of the company amount to \$2,000,000 per year the salary shall be increased to \$10,000 per year, is not invalid on its face as contrary to public policy, the use of corrupt practices not being a necessary incident of the performance of such a contract.

CONTRACT, with a first and a second count on a contract in writing to employ the plaintiff as agent for five years, the first count alleging performance on the part of the plaintiff and a refusal of the defendant to pay the plaintiff's salary, and the second count alleging readiness and willingness and an offer to perform on the part of the plaintiff and prevention of performance by the defendant, with a third count on an account annexed for \$4,440 alleged to be due as salary from March 1 to October 12, 1903, with interest from November 20 to the date of the writ amounting to \$24.42, not referring to the contract in writing. Writ in the Supreme Judicial Court dated December 23, 1903.

The contract declared on in the first and second counts was as follows:

"Be it known, that on the second day of March, 1903, the American Pneumatic Service Company, a corporation legally organized under the laws of the State of Delaware, for itself, its successors and assigns, party of the first part, and William R.



Kerr of Chicago, Cook County, State of Illinois, party of the second part, enter into the following agreement:

"Article I. Said American Pneumatic Service Company agrees to employ said Kerr from the first day of March, 1903, for the term of five (5) years as its agent in attending to government and franchise matters, at a salary of seventy-two hundred dollars (\$7,200) per year and reasonable travelling expenses when on business of the first party; but when the amount of contracts of the pneumatic tube service between the said American Pneumatic Service Company and its subsidiary companies and the United States Government shall equal the sum of two million dollars (\$2,000,000) per year, then the said salary shall be increased to ten thousand dollars (\$10,000) per year for the balance of said term of employment.

"Article II. Said Kerr agrees to devote all his time and attention as agent of said company to the business of said company in the United States in relation to the carrying of mail by pneumatic tube service in which this company is or may be interested, either directly or through subsidiary companies, and act as directed by the board of directors or by the president of the first party, within the scope of this employment.

"Article III. This contract may be terminated by the party of the first part by a vote of its directors to that effect, upon thirty (30) days' notice thereof in writing to the party of the second part, and thereupon the party of the second part shall be entitled to one year's salary from the date of said notice.

"In witness whereof the said American Pneumatic Service Company has caused its incorporate name to be signed hereto and its corporate seal to be affixed by Arthur S. Temple, its Treasurer, hereunto duly authorized, and the said William R. Kerr has hereunto set his hand and seal, both on the day and year first above written. American Pneumatic Service Company, Arthur S. Temple, Treasurer. William R. Kerr."

The defendant demurred to the declaration, alleging as causes of demurrer, first, that the contract, as set forth in the declaration and under which the claims as alleged in the several counts were based, was invalid in law, and, second, that in neither of the counts had the plaintiff set forth a legal cause of action.

The case came on to be heard before *Lathrop, J.*, who reserved



it for determination by the full court upon the declaration and demurrer. If the demurrer was sustained judgment was to be entered for the defendant; otherwise, the defendant was to have leave to answer over.

*W. R. Sears*, for the plaintiff.

*H. M. Burton*, for the defendant, submitted a brief.

BARKER, J. It is to be inferred from the declaration and the contract referred to in the first and second counts that the business of the company is concerned with the carrying of mail matter by pneumatic tube service. If so, its business must involve the procuring of franchises from governmental bodies general or local allowing the laying, maintaining and operating of such tubes, as well as contracts from the proper authorities for the carrying of mail matter by means of the tube service. In both of these classes of the company's business it is possible for it or its agents to attempt to use corrupt practices to gain its ends. In neither class is the use of any corrupt practice a necessary incident of such a business as the contract contemplates. In the defendant's dealing with "government and franchise matters," and in the procuring of contracts for carrying the mails, and in the adjustment of claims and demands arising from the execution of such contracts, the defendant being a corporation must act by an agent of some kind. In each and all of such matters there is occasion for an agent to render to the corporation services which in every possible aspect would be legitimate, and not open to criticism as in any way contrary to public policy or good morals, or to upright and fair dealing. *Oscanyan v. Arms Co.* 108 U. S. 261, and cases cited. If the contract contemplates only such services it is not illegal merely because an agent employed under it might misconduct himself and use corrupt methods. *Barry v. Capen*, 151 Mass. 99, 100. Upon this demurrer it cannot be ruled as matter of law that the contract calls for other than legitimate work on the part of the plaintiff. See *Fuller v. Dame*, 18 Pick. 472; *Frost v. Belmont*, 6 Allen, 152; *Barry v. Capen*, *ubi supra*; *Oscanyan v. Arms Co.* 108 U. S. 261, and cases cited. If such work only is contemplated, the provision for an increase of salary when the government mail contracts reach a certain amount cannot be said to be one which has a tendency to induce the use



of corrupt or improper acts on the part of the agent. An agent who gives all his time to the business of a principal fairly may be given a compensation increasing with the volume of the business.

The third count of the declaration does not refer in terms to the written contract. As there is no allegation that the three counts are for one cause of action only, the third count is good in any event.

Of course, if upon a trial it appears that the real purpose of the company was to procure and of the plaintiff to render services in any way looking to improper influence or practices for their success, the trial court will know how to deal with the case in the manner demanded by the principles stated by Chief Justice Shaw in *Fuller v. Dame* and by Mr. Justice Chapman in *Frost v. Belmont*.

*Demurrer overruled ; defendant to have leave to answer over.*

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MARY E. SPINNEY vs. BOSTON ELEVATED RAILWAY  
COMPANY.

Suffolk. March 8, 1905. — April 7, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Negligence. Street Railway. Interrogatories.*

If the conductor of a street car while collecting fares negligently allows himself to be thrown by a jolt of the car against a passenger standing in the aisle of the car and holding on by a strap the railway company is liable to the passenger for injuries thus caused whether the conductor was competent or incompetent and whether or not the company reasonably might have known of his incompetency. Orders allowing a party to whom interrogatories have been addressed leave to file further answers or further time in which to answer are within the discretion of the trial judge.

If a person to whom interrogatories are addressed declines to answer a question for one of the reasons for which he is permitted to decline to answer by R. L. c. 173, § 63, he must state the reason under oath in answer to the interrogatory in order to avail himself of the privilege.

In an action against a street railway company for personal injuries alleged to have been caused by the negligence of the conductor of a car of the defendant in which the plaintiff was a passenger, the plaintiff cannot by interrogatories filed



under R. L. c. 178, § 57, compel the defendant to disclose the contents of a report signed by the conductor and the motorman of the car containing an account of the accident and the names and addresses of the persons who were present.

TORT for personal injuries while the plaintiff was a passenger on a car of the defendant on February 7, 1902, alleged to have been caused by the negligence of the conductor of the car and of other servants of the defendant. Writ dated April 1, 1902.

At the trial in the Superior Court before *Bishop*, J. the jury returned a verdict for the defendant; and the plaintiff alleged exceptions in two bills as stated by the court.

*H. E. Bolles & J. L. Putnam*, for the plaintiff.

*E. P. Saltonstall & S. H. E. Freund*, for the defendant.

BARKER, J. The action is for personal injuries alleged to have been received by a passenger in an electric street car at the crossing of Massachusetts and Huntington Avenues in Boston. There was no dispute that the plaintiff was standing in the car, all the seats being occupied by passengers. She was thrown to the floor because of a jolt or jolts of the car as it moved over the crossing. As to other circumstances the evidence was contradictory, tending to prove, on the one hand, that the plaintiff and the conductor were the only persons standing in the aisle, the plaintiff being near the rear end and the conductor near the front and engaged in collecting fares, and that the plaintiff after having been taken from her footing by the jolting was hanging from a car strap when the conductor, thrown from near the front of the car to the place where the plaintiff was hanging, forcibly came against her and caused her to fall, he falling upon her. Also that the jolt or jolts were very violent and that they were caused in part by the turning on of the electricity for the purpose of moving the tongue of an electrical switch, as well as by the crossing of the car over other car tracks laid lengthwise on Huntington Avenue. On the other hand there was evidence tending to prove that a number of other passengers were standing in the aisle, that the conductor did not fall upon or against the plaintiff nor come in contact with her, that the plaintiff merely swayed back against the door and slid to the floor, and that there was no unusual or unreasonable jolt.



There was no contention but that the plaintiff was in the exercise of due care.

There are two bills of exceptions each filed by the plaintiff. The first is as to the action of the trial judge in dealing with requests for instructions to the jury. The plaintiff presented eleven requests, all of which it now is conceded were given in terms or covered by the charge, except the fourth, fifth and sixth. The first exception is to an alleged refusal to give those requests. The defendant presented six requests, and the fifth and sixth were given under an exception on the part of the plaintiff.

We think that the charge covered fairly and properly all the matters dealt with in the plaintiff's fourth, fifth and sixth requests. As no argument to the contrary has been addressed to us it is unnecessary to consider these requests in detail. The plaintiff's exception to the refusal to give them in terms is overruled.

The defendant's fifth and sixth requests, which were given in terms under the plaintiff's exception were as follows :

"5. If there was no evidence that the conductor in this case was an incompetent man or one whom the defendant company might reasonably be expected to have known would be likely to trip or fall or act in a clumsy or careless way, and if the jerk of the car which caused the conductor to fall (if the jury believe it did cause it) was a jerk resulting from proper and careful handling and propelling of a safe and proper car in good condition, over safe and proper rails, switches or other equipment also in good condition, then the fact that the conductor fell would not of itself be evidence of negligence for which the defendant company could be held responsible in this case.

"6. If there is no evidence that the defendant company had knowledge of the fact that this conductor was in any way incompetent either because of carelessness or because of the fact that he was an unusually clumsy or awkward man, then if the said conductor was thrown against the plaintiff by an ordinary movement of the car which of itself was no evidence of negligence, even if the jury believe that to be a fact, the defendant company could not be held responsible for the result of the said conductor falling against the said plaintiff."



In substance these requests are to the effect that although there was a jerk, if it resulted from the proper managing of a proper car upon a proper track the falling of the conductor upon the plaintiff would not of itself be evidence of actionable negligence, if the company did not know or could not reasonably be expected to know that he was an incompetent man, and that in the absence of such knowledge the defendant could not be held responsible in damages for the conductor being thrown against the plaintiff by an ordinary movement of the car. Or, in other words, that unless the defendant knew or had reason to know that the conductor was incompetent by reason of carelessness or awkwardness or clumsiness, the defendant could not be held responsible for injury received by the passenger by the conductor being thrown against her either by a jerk of the car or by its ordinary movement, if the car, the track and the management of the propelling of the car were proper as assumed in the fifth request, or without that, if he was thrown by the ordinary movement of the car as assumed in the sixth.

Correct and sufficient instructions as to the responsibility of the defendant for the conductor's acts had been given to the jury by the presiding judge in language of his own. After stating the conflicting evidence upon the point he said, "If the conductor's conduct was negligent and unfit for the duties of his position resulting in the plaintiff's harm, then that is negligence for which the defendant company would be responsible. But if he did on that occasion what it was reasonable to expect, if while he was standing collecting fares at the other end of the car this sudden jerk or jolt came and he was thrown beyond his power to prevent it, and he managed his person and his steps and momentum, and the force of his plunge, if he made a plunge, as well as he could, as well as was reasonable to expect under circumstances of that character, then the company would not be liable . . . on account of his personal conduct."

The movements and acts of the conductor in their bearing upon the safety of the plaintiff as a passenger were as between her and the defendant acts concerning their undertaking with her to use the proper degree of care in all respects to carry her safely. So to speak, his conduct in the car was official conduct as it regarded a passenger, and could not be looked at in a light



merely personal to himself. If it was in any respect wanting in due care and that negligence caused injury to the plaintiff's person, it was negligence for which the defendant was answerable, whether the conductor was competent or incompetent, and whether or not the company might reasonably have known his incompetency. Not only did these rulings forbid the jury to find that an injury to the plaintiff occasioned by the negligence of the conductor in carelessly coming in contact with the plaintiff and thereby throwing her down and falling upon her would not be a ground for damages unless the company knew or had reason to know that the conductor was incompetent, if the accident was caused by a jerk, but also if his so falling against the plaintiff was brought about merely by the ordinary motion of the car. Plainly a carrier of passengers is answerable for such negligence of an employee.

Probably the requests were understood by the presiding judge in some sense which at the time made them seem consistent with the rule laid down in his charge as to the effect of the personal conduct of the conductor. But we think they could not so have been understood by the jury, and that they tended to induce the jury to believe that even if they found that the plaintiff was hurt by the negligence of the conductor in carelessly allowing himself to be thrown against her, the defendant was not answerable unless it knew or had reason to know that he was incompetent. The exception to the giving of the fifth and sixth of the defendant's requests is sustained.

We think the other bill of exceptions must be overruled.

The plaintiff on July 14, 1902, filed interrogatories to the president of the defendant corporation under the provisions of R. L. c. 173, §§ 57 *et seq.* Answers were filed on July 16, 1902. On July 23 the plaintiff moved that the answers be adjudged insufficient and that the president be ordered to make further and complete answers. There was a hearing upon this motion, and on October 6, 1902, the defendant was ordered to file additional answers in accordance with a memorandum of the judge who heard the motion, and which said, "1. On the face of the interrogatories and answers, no legal reason appears why the defendant, by its president, should not fully answer the questions propounded by the plaintiff. *Gunn v. New York, New Haven,*



*Hartford Railroad*, 171 Mass. 417, 420, 421. 2. At the hearing of the motion, counsel for the defendant stated that the president declined to answer, for the reason that he was within the protection of R. L. c. 173, § 63. But the plaintiff is entitled to the oath of the party interrogated that the matters inquired of are within the protection of the statute. This should be fully stated in the answer or answers. 3. The defendant may, on or before October 25, 1902, file such additional answers, if so advised, and I will then take the matter for further advisement."

On October 13, 1902, by leave of court further and fuller answers were filed, and again on October 29, 1902, further amended and fuller answers were filed, and thereupon an order of the court was entered in these words: "Defendant ordered to set out the reasons why it declines, by its president, to answer the interrogatories, on or before the second Monday of November, 1902."

On November 5, 1902, by leave of court the defendant filed a further amended answer.

The bill of exceptions does not state that any further application was made to the court on the part of the plaintiff with reference to the interrogatories, or that any order of the court ever was made with reference to them, other than the orders above recited. The bill concludes with these words: "The plaintiff being aggrieved by the rulings of the court duly excepted and prays that these exceptions may be allowed."

The purpose of the attempt on the part of the plaintiff to get further answers was to compel the defendant to disclose the contents of a certain report of the accident signed by the conductor and the motorman of the car containing an account of the accident and the names of persons who were present. The existence of such a report had been disclosed in the answers filed on July 16, 1902. The motion of July 23 asked that the defendant be compelled to file a copy of the report or allow the plaintiff's attorneys a reasonable opportunity to inspect the original.

The plaintiff's brief states that the judge who passed upon this motion refused to order the defendant's president to allow the plaintiff to see the report, and refused to order the defendant to give the plaintiff the names of the motorman, the conductor or of the passengers. This statement is not borne out by the



record. On the contrary, the judge ruled that no reason appeared why the defendant should not fully answer the interrogatories, and gave leave to file further answers. At no time was there a ruling that the defendant need not disclose the report. The only orders of the court upon the matter were orders either directing or giving leave to the defendant to file further answers, and after the final answers were so filed the plaintiff made no further application to the court, and proceeded to trial without such application.

It is well settled that orders allowing the party interrogated leave to file further answers, or further time in which to answer, are within the discretion of the court. *Harding v. Noyes*, 125 Mass. 572. See also *Stern v. Filene*, 14 Allen, 9; *Hancock v. Franklin Ins. Co.* 107 Mass. 113; *Harding v. Morrill*, 136 Mass. 291; *Fels v. Raymond*, 139 Mass. 98, 101. For this reason no exception lay to any order stated in the bill of exceptions. Nor was there any error in the rulings made in the memorandum of decision accompanying the order of October 6, 1902. The first ruling, that on the face of the papers no legal reason appears why the defendant should not fully answer the questions was in the plaintiff's favor. The other, that the plaintiff was entitled to the oath of the party interrogated that the matters inquired of are within the protection of the R. L. c. 173, § 63, and that this should be fully stated in the answers was correct. *Hobbs v. Stone*, 5 Allen, 109, 110. But as the question whether the plaintiff had the right to compel a disclosure of the report which was in the possession of the defendant has been argued by both parties and is of some practical importance we will dispose of it.

It is idle to contend that the report, as a document, is material to the plaintiff's case. The answers given disclose the fact of its existence, that it is signed by the conductor and motor-man of the car, that it contains an account of the accident and furnishes a list of names and addresses of persons who were witnesses to the accident, and that it states that the accident happened on car 1456 on route 728, opposite 328 Massachusetts Avenue, at 8.42 A. M. on February 7, 1902, and that the report contains information material to the defence of the case and also the names of the defendant's witnesses.



The statute provides that "the party interrogated shall not be obliged . . . to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case." R. L. c. 173, § 63. The party interrogated cannot be compelled to get up the case of the other party for him, nor to disclose his own case. *Gunn v. New York, New Haven, & Hartford Railroad*, 171 Mass. 417, 421. *Robbins v. Brockton Street Railway*, 180 Mass. 51, 55.

It seems to us that to have compelled the defendant to file the report or to allow an examination of it by the plaintiff's attorneys, or to have compelled the defendant to have disclosed the account of the accident given in the report, or the statement given in it of the names and addresses of the persons who witnessed the accident would, as was said of certain questions considered in *Robbins v. Brockton Street Railway*, *ubi supra*, practically have been to compel the defendant to get up the plaintiff's own case, and practically to compel the defendant to disclose the names of the persons by whom and the manner in which it proposed to prove its own case. Indeed the argument of the plaintiff is that knowledge on the part of her attorneys of the names of the motorman and the conductor and of the other persons who witnessed the accident would have helped in the preparation of her case. We do not think the defendant could have been compelled properly to give her that information.

*First bill of exceptions sustained; second bill overruled.*



MARY NAGLE, administratrix, vs. BOSTON AND NORTHERN  
STREET RAILWAY COMPANY.

HENRY P. HART vs. SAME.

Essex. March 15, 1905. — April 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Evidence, Declarations of deceased persons. Negligence, Contributory. Street  
Railway.*

A declaration of a deceased person may be admitted under R. L. c. 175, § 66, although made in assent to a leading question if the question called for a fact within the personal knowledge of the declarant.

In an action by the widow of a motorman against the railway company by whom he was employed for his death alleged to have been caused by the starter of the defendant negligently giving him an order to proceed with his car on a single track without waiting for another car to pass him, in contravention of a general order, by reason of which he was killed by a collision, the starter denied that he gave any such order, and the conductor of the car of which the intestate was the motorman testified that as the car went upon the single track, proceeding toward a place called the Willows instead of stopping, he said to the deceased motorman "Jim, did you have orders to go to the Willows?" and that the deceased said "Yes" and nodded, and that after the collision when the conductor was in the ambulance with the deceased he said to him "Jim, did you get orders to go to the Willows?" and the deceased said "Yes, I did." The answers were objected to as not admissible under R. L. c. 175, § 66, because made in answer to leading questions and as merely embodying the declarant's inference as to what had been done or said by others. *Held*, that under the circumstances disclosed by the evidence the questions put by the conductor called for a fact within the personal knowledge of the deceased motorman and not for an inference to be made by him, and that the answers properly were admitted in evidence under the statute.

In an action by the widow of a motorman killed by a collision against the railway company employing him for causing his death, it is a question of fact for the jury whether the plaintiff's husband was in the exercise of due care in obeying the order of a starter of the defendant to proceed on a single track on which a car was to come in the opposite direction without waiting for the car to pass him on a double track before starting on the single one as a general order of the defendant required him to do.

In two actions against a street railway company for the death of one motorman and injuries to another from a collision of their two cars running in opposite directions on the same single track, it is a question of fact for the jury whether it was negligent for the husband of the plaintiff in the one case and the plaintiff in the other to run their respective cars at the rate of eight miles an hour in a thick fog upon a single track which was greasy because of dampness and fallen leaves.

In an action by a motorman against the railway company employing him for injuries from a collision of his car with another car of the defendant coming from



the opposite direction upon the same single track, if it appears that a general order of the defendant had been in force for four days requiring the cars coming from the opposite direction to wait upon a portion of the road having a double track until the plaintiff's car should pass, and if it also appears that on three of the four days that the order had been in force it had been disobeyed by the persons in charge of the car coming from the opposite direction, it is a question of fact for the jury whether the plaintiff and the conductor of his car knew of such disobedience or reasonably supposed that in those instances special orders had been given for the car to proceed, and, even if they knew that the order had been disobeyed and had failed to report the disobedience, it still would be a question for the jury whether they were in the exercise of due care in proceeding under a general order requiring their car to make the trip it was making.

TWO ACTIONS OF TORT against the Boston and Northern Street Railway Company for the suffering and death of one motorman and for injuries to another from a collision of two cars running in opposite directions upon the same single track of the defendant, the first action by the administratrix of the estate of James E. Nagle who also sued under R. L. c. 106, § 73, as his widow, and the second by Henry P. Hart. Writs dated February 27, 1902, and January 20, 1902.

In the Superior Court the cases were tried together before *Gaskill, J.* Against the objection of the defendant the judge admitted the declarations of James E. Nagle which are stated in the opinion, and refused to order a verdict for the defendant. In each case the jury returned a verdict for the plaintiff, in the first case in the sum of \$5,000, of which \$3,000 was for conscious suffering of the plaintiff's intestate and \$2,000 for causing the death of the plaintiff's husband, and in the second case in the sum of \$350. The defendant alleged exceptions.

*J. P. Sweeney*, for the defendant.

*J. G. Walsh*, for Nagle.

*W. J. Bradley*, for Hart, submitted a brief.

**BARKER, J.** These actions arose from the same collision and were tried together. They are here upon the defendant's exceptions to the admission in evidence under the provisions of R. L. c. 175, § 66, of certain declarations made by Nagle, the intestate of whose estate the plaintiff in the first action is the administratrix, and upon an exception to the refusal of the judge to order verdicts for the defendant.

The collision occurred because the car of which Nagle was motorman, instead of stopping at the point where under the



general running orders in force it should stop unless in any instance special directions otherwise had been given, until the car of which Hart was motorman had arrived and passed upon a double track, failed to stop, and ran on upon a single track leading to the Willows. Hart's car was running in accordance with the general order.

As Nagle's car went on to the single track instead of stopping his conductor said to him, "Jim, did you have orders to go to the Willows?" Nagle said "Yes" and nodded. After the collision, as the conductor was riding in the ambulance with Nagle the conductor said to him "Jim, did you get orders to go to the Willows?" and he said "Yes, I did." This was the evidence admitted under exception.

It is urged in support of the exception, that the declarations of Nagle were inadmissible because made in answer to leading questions, and because they merely embody the declarant's inference as to what had been done or said by others. But the statute applies to every declaration of a deceased person found to be made in good faith before the commencement of the action and upon the personal knowledge of the declarant. If the statute was not intended to apply to declarations made in answer to leading questions the Legislature would have so said. Its words are not to "be narrowed from their natural meaning." *O'Driscoll v. Lynn & Boston Railroad*, 180 Mass. 187, 189. We think the questions put by the conductor were such under the circumstances as clearly to call upon Nagle for a fact within his own knowledge rather than any inference of his own; and that it was for the jury to say whether he proceeded without stopping to wait for the other car in consequence of an express order to that effect given to him. See *Huebener v. Childs*, 180 Mass. 483, 485. The statute has been construed liberally, the declarations when admitted being regarded as those of a witness and given probative effect. See *Brooks v. Holden*, 175 Mass. 137; *Mulhall v. Fallon*, 176 Mass. 266; *Stocker v. Foster*, 178 Mass. 591, 603; *Dixon v. New England Railroad*, 179 Mass. 242, 246; *O'Driscoll v. Lynn & Boston Railroad*, 180 Mass. 187, 189; *Huebener v. Childs*, 180 Mass. 483; *Green v. Crapo*, 181 Mass. 55, 63; *Stone v. Commonwealth*, 181 Mass. 438, 440; *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 99; *Hayes*



v. *Pitts-Kimball Co.* 183 Mass. 262, 264; *Cogswell v. Hall*, 185 Mass. 455, 458. We think the evidence was admitted rightly.

Its weight and the inferences to be drawn from it were for the jury. Assuming, as practically is conceded, that if Nagle had received orders to go through to the Willows without waiting at the end of the double track to meet the other car, such orders could have been given only by Boles the starter at Lawrence, the positive denial by Boles upon the stand that he gave any such order was also to be weighed by the jury. If weighing all the evidence they found that Nagle went on without waiting for the other car in pursuance of orders given him by Boles they could find that the omission to wait for that car to pass was not negligent. Whether it was negligent for Nagle or for Hart to run their respective cars at the rate of eight miles an hour in a thick fog upon a single track which was greasy because of the dampness and the fallen leaves was also a question for the jury.

Assuming that upon three of the four days since the new order had been made for the car going towards the Willows from Lawrence to wait at the end of the double track, that order had been disobeyed by the persons in charge of that car, it was a question of fact for the jury upon the evidence whether Hart and his conductor knew of such disobedience or reasonably supposed that in those instances special orders had been given for the car to proceed. Even if they knew that the rule had been disobeyed and failed to report that disobedience, as the general order requiring their car to proceed past the Willows was in force, and it was their duty to act accordingly, we think it still a question for the jury whether they were in the exercise of due care in proceeding under the general order. So too it was for the jury to say whether, if Nagle received from Boles an order to go through to the Willows, Nagle could without negligence on his own part rely on Boles to protect the car from a collision.

In our opinion the cases were for the jury.

*Exceptions overruled.*



## JOSEPH HELLEN vs. CITY OF MEDFORD.

Middlesex. May 20, 1904. — April 28, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.*Constitutional Law, Vested rights. Medford. Waiver.*

St. 1900, c. 196, providing that the park commissioners of Medford might by a deed acknowledged and recorded abandon any part of the land or rights in land taken by them under statutory authority on a certain date and that such abandonment should revert the title as if no taking had been made and might be pleaded in reduction of damages in any suit on account of those takings, is unconstitutional as violating the vested rights to compensation of an owner and of a lessee of land taken in fee by the park commissioners on the date named.

The right to object to a statute as unconstitutional on the ground that it violates vested rights may be waived.

After certain land had been taken in fee by park commissioners under statutory authority a statute was passed authorizing them to abandon any land taken on a certain day and providing that such abandonment might be pleaded in reduction of damages in any suit on account of the taking. The owner of land which thus had been taken and abandoned agreed with the city for which the park commissioners took the land that if his land was abandoned by the city for his benefit his damages would be very small, if any, and that \$1,000 would be a reasonable sum for him under that agreement. *Held*, that the landowner had waived the right to set up the unconstitutionality of the statute as violating his vested right to compensation for the taking of his land in fee.

PETITION, filed in the Superior Court for the county of Middlesex on October 15, 1900, under St. 1882, c. 154, § 5, for the assessment by a jury of damages for the taking of certain land of the petitioner on the Mystic River for a portion of a park. Dana B. Cutter, the lessee of the land at the time of the taking, was cited into the case by the petitioner Hellen.

At the trial in the Superior Court *Sherman*, J. ordered a verdict for the petitioner Hellen in the sum of \$1,159.25, \$1,000 being the damage found by the jury and \$159.25 the interest thereon. At the request of the petitioner Hellen and of the lessee Cutter, made a petitioner as above stated, the judge reported the case for determination by this court, such judgment to be entered as upon the facts the law might require. The facts are stated in the opinion.



The case was submitted on briefs at the sitting of the court in May, 1904, and afterwards was submitted on briefs to all the justices.

*S. H. Tyng & M. L. Sanborn*, for the petitioners Hellen and Cutter.

*J. M. Hallowell & H. H. Kimball*, for the respondent.

HAMMOND, J. Under the authority of St. 1882, c. 154, § 3, the park commissioners of Medford took certain land, and on November 29, 1899, filed a certificate as required by the fourth section. No entry ever was made upon the land. The taking was simply on paper. By virtue of the proceedings, however, the respondent became the owner in fee of the land and was bound to pay to those whose estate had been taken the damages respectively suffered by them. St. 1882, c. 154, §§ 3, 6. *Hay v. Commonwealth*, 183 Mass. 294. At the time of the taking the land was owned by the petitioner Hellen in fee subject to an outstanding leasehold estate for years owned by one Cutter. It does not appear that the damages ever were estimated or determined by the commission. Several months after the taking and while the parties were trying to come to some agreement as to the damages and before any agreement had been reached or any proceedings had been taken in court, St. 1900, c. 196, was enacted. It provided that any part of the land or rights in land taken and described in the certificate of November 29, 1899, might in the manner set forth in the statute be abandoned, that such abandonment should "revest the title to such lands or rights as if they had never been taken, in the persons, their heirs and assigns, in whom it was vested at the time of taking," and also that the abandonment might "be pleaded in reduction of damages in any suit on account of said takings." All of the land was duly abandoned in accordance with the terms of the statute, and to this petition that fact was pleaded in reduction of damages. The lessee, Cutter, upon a citation from the petitioner appeared in the suit and claimed damages for the loss of his leasehold estate. At the trial the judge refused to rule as requested by the petitioners that St. 1900, c. 196, was unconstitutional, and submitted certain questions to the jury, who found in substance that the fair market value of the land at the time of the taking was \$13,000; that the damage to Hellen by reason of



the taking and abandonment was \$1,000; that the damage to Cutter by the taking was \$1,000, but, as reduced by the abandonment, nothing; and also that Hellen, by his agent, agreed that if the property was abandoned by the respondent for his benefit his damages would be very small. The judge thereupon ordered a verdict for the petitioner Hellen for \$1,000 and interest, and at the request of the petitioners the case was reported to this court.

The first question is whether St. 1900, c. 196, is constitutional. In considering this question certain well established rules must be borne in mind. Speaking generally, the power to take land for public use by right of eminent domain is limited, not only as to quantity but as to the nature of the interest taken, by the public necessity. It is said that "the right being based upon necessity cannot be any broader than the necessity." Cooley, Const. Lim. (7th ed.) 808. It therefore generally happens that in cases of land taken under the exercise of this right only an easement is taken, the fee remaining in the owner. A familiar example of this is to be found in the case of land taken for a highway. In such a case, where the easement is lawfully abandoned or discontinued as no longer necessary, the fee is in the owner, free from the easement; but, as stated by Shaw, C. J. in *Harrington v. County Commissioners*, 22 Pick. 268, 267, "the enlarged enjoyment which the owner has thereby, is not derived from the public, but is incident to the ownership, which has always subsisted from the laying out of the highway." And in the case of such a lawful abandonment or discontinuance before the assessment of damages, there can be no doubt that the fact of such an ending of the easement can be put in evidence on the question of damages. But the ground of the admissibility of this fact is not that the thing once taken from the owner has been restored to him, but that the evidence tends to show the nature and extent of the thing taken. The thing taken is the use of the land for a highway so long as the public necessity requires, and the sum to which the owner is entitled is the damage by reason of such taking. And that is the rule of damage all the way through, as well at the time of the trial as at the time of the taking. The evidence of a lawful ending of the easement before the trial, whether by discontinuance or otherwise, is admissible, therefore, to make more certain the nature of the ease



ment taken, but not to show that the right to damages has been changed. It is manifest that the lawful ending of such an easement by the public authorities impairs no right of the landowner as to damages. It tends only to define this right as it at first existed.

It is pretty generally conceded, however, in the various State courts, that in some cases it is competent for the State to take for public use the land in fee, so that not even a possibility of reverter is left in the former owner. The idea seems to be that in some cases "the public purposes cannot be fully accomplished without appropriating the complete title; and where this is so in the opinion of the Legislature, the same reasons which support the Legislature in their right to decide absolutely and finally upon the necessity of the taking will also support their decision as to the estate to be taken." Cooley, Const. Lim. (7th ed.) 809, and cases cited in the notes. This principle is thus stated by Field, C. J. in *Burnett v. Commonwealth*, 169 Mass. 417: "When land is taken for a public use, it is ordinarily within the discretion of the Legislature to determine whether it shall be taken in fee, so that when the public use is determined the title will remain in the body taking it, or whether it shall be taken only to the extent necessary for the public use, and so long as that use continues."

As hereinbefore stated, in the case before us the fee was taken, leaving not even the possibility of a reverter in the former owner. St. 1882, c. 154, §§ 3, 4, 6. (For other instances of a taking of a fee, see *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303; *Titus v. Boston*, 161 Mass. 209.) At the time St. 1900, c. 196, was enacted, the fee having passed to the respondent, the petitioners were entitled, under the Constitution and the statutes then in existence, to have their damages paid in money. This was a vested right. It is urged by the respondent that this vested right consisted of a constitutional right to reasonable compensation and of the statutory right to have it assessed and paid in money; and that while the constitutional right could not be impaired by the Legislature the statutory right might be changed at will, provided always that the constitutional right to reasonable compensation was not impaired. And it is urged that the statutory right does not become vested



until it has been fully pursued and damages assessed. See *Harrington v. County Commissioners, ubi supra*.

While it is true that every State has complete control over the remedies it offers to suitors; while it may abolish one class of courts and create another, may abolish old remedies and substitute new, or may abolish even without substitution if a reasonable remedy remains (Cooley, Const. Lim. (7th ed.) 515, 516, and cases cited in the notes thereto); and while, as stated by Parker, C. J. in *Springfield v. County Commissioners*, 6 Pick. 501, 508, "there is no such thing as a vested right to a particular remedy," yet a substantive vested right cannot be impaired under the guise of a change in the remedy.

The statute in question did not undertake to define the nature of the thing originally taken, but to change the right to damages. Before the passage of the statute the petitioners were entitled to have their damages assessed and paid in money. This was a substantive right. After the statute they were deprived of this right and were obliged to take land instead of money. This was a change not only in the remedy but in the thing that the petitioners were entitled to have. It is of no consequence whether the substantive right vests by virtue of a provision in the Constitution or in a statute, provided it is vested. The remedy may be changed but the right to money cannot be changed. As to that, no matter how the remedy be changed, the result reached must be in substance the same. This conclusion is not inconsistent with the decision in *Harrington v. County Commissioners, ubi supra*, upon which the petitioners rely. We are of opinion therefore that the statute is unconstitutional as applicable to this case.

The next question is whether the petitioner Hellen is in a situation to avail himself of that point. The jury have found that he agreed that if the property was abandoned by the respondent for his benefit his damages would be very small, if any, and that \$1,000 would be a reasonable sum for him under that agreement. It is not contended that the finding was not warranted by the evidence; and the fair inference is that the abandonment was made under that agreement. Under these circumstances the case is within the well known principle that, where a constitutional provision is designed for the protection of property rights



of a person, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will; (Cooley, Const. Lim. (7th ed.) 250, 251, and cases cited in the notes;) and he must be held to have waived his right to insist upon the unconstitutionality of the statute. It does not appear, however, that Cutter waived his rights.

The result is that as to Hellen there should be judgment on the verdict, and as to Cutter, judgment for \$1,000 with interest; and it is

*So ordered.*

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JONAS HAGAR, administrator, vs. LILLIAN B. NORTON.

Suffolk. November 11, 1904. — May 2, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Action, Survival. Conversion. Contract, Implied: common counts. Practice, Civil, Verdict. Evidence, Competency, Remoteness.*

A right of action for the conversion of personal property obtained by fraud and for money had and received for the portion of it turned into money survives to the administrator of the person defrauded.

An action for money had and received will not lie for the conversion of a certificate of shares in a corporation which is not sold by the wrongdoer but is surrendered by him to the corporation in exchange for a new certificate in his own name.

Where in an action to recover property obtained by fraud there is a count for conversion and one for money had and received and the jury return a general verdict for the plaintiff, if it has appeared that the property was converted by the defendant to his own use but was not turned into money the verdict cannot be sustained, as it may have been returned on the count for money had and received which will not lie for such a conversion.

In an action for property alleged to have been obtained fraudulently by the defendant from the plaintiff's intestate when mentally incapacitated by inducing the intestate to sign orders for money in savings banks and a transfer of shares of stock, if the defendant has testified to the signing of the orders and the transfer of the shares and has introduced the testimony of other witnesses as to the intention of the intestate to give the property to the defendant, the presiding judge in his discretion may allow the plaintiff to call witnesses to testify to declarations of the intestate, made four or five years before the signatures, that the intestate intended her property to go to the plaintiff, who was her husband, and to a similar declaration made a few months before her death, such declarations being competent to throw light upon the condition of the intestate's mind at the time of signing the orders and transfer, and the limit of time being a matter which must be left largely to the discretion of the presiding judge.



LATHROP, J. This is an action brought by the administrator of the estate of Winnifred E. Hagar, who was also her husband, against the sister of the intestate, who was her next of kin. The writ is dated November 1, 1900, and is in contract or tort. The declaration contains two counts, both alleged to be for the same cause of action. The first count alleges in substance that the plaintiff is the administrator of the estate of Winnifred E. Hagar, who died September 20, 1900; that prior thereto the intestate had for a long time suffered from an incurable malady which weakened her mentally and physically; that on or about September 12, 1900, the intestate had become so weakened physically and mentally that she was not able to care for herself in any way physically, and was incompetent to know and understand ordinary matters of business, her own property or the details of the daily life about her; that on or about said September 12, and while the intestate was in the condition above described, the defendant, well knowing and understanding the intestate's physical and mental condition, by means of fraud and undue influence practised upon the intestate, obtained from her certain books of deposit in savings banks in this Commonwealth, and also a certificate of ten shares of the common stock of the American Sugar Refining Company; and at the same time the defendant obtained from the intestate, by the use of fraud and undue influence practised upon the intestate, her signature to an assignment of each of the savings bank books and of the certificate of stock, although the intestate, at the time of the transfer, did not know and intend, and was not capable of knowing and intending, to do what she then did; and thereupon the defendant converted to her own use the books of deposit, and the certificate of ten shares of stock. The declaration further alleged a demand by the plaintiff upon the defendant to deliver the books of deposit and the certificate of stock, and a refusal by her to comply with the demand.

The second count was for money received by the defendant to the plaintiff's use.

The answer contained a general denial, and alleged payment.

After a verdict for the plaintiff, the case comes before us on the defendant's exceptions to the refusal of the presiding judge to give certain requests for instructions, and to the admission of



certain evidence. The bill of exceptions recites that the judge gave full and complete instructions concerning the different phases of the case, to which no exception was taken.

It is unnecessary to state in detail the evidence which is set forth at some length in the bill of exceptions. It is enough to say that the evidence put in by the plaintiff sustained the allegations contained in the first count, while that introduced by the defendant tended to show the contrary. We shall refer to some of it hereafter.

We proceed to consider the requests for instructions which were made at the close of the trial, and were as follows: "1. That upon all the evidence the plaintiff is not entitled to recover upon the first count of his declaration. 2. That upon all the evidence the plaintiff is not entitled to recover upon the second count of his declaration. 3. That in any event the plaintiff is not entitled to recover anything on account of the sugar stock described in his declaration under the second count." The judge refused these requests and ruled that upon the evidence the jury would be justified in finding a verdict for the plaintiff, both as to the savings bank deposits and the ten shares of stock.

The argument of the counsel for the defendant on the first request is that there was a gift to the defendant from the intestate of the deposit books and the certificate of stock; that this gift was voidable and not void, and that, as the deposit books had been converted into money and the certificate of stock had been delivered up to the corporation which issued it and a new certificate taken out before the administrator was appointed, he cannot now maintain the action for the original conversion. The basis of the argument is that there was a gift to the defendant. The short answer to this is that the evidence that there was a gift comes from the defendant, and the jury were not bound to believe her or her witnesses.

The plaintiff's case proceeds upon the theory that Winnifred E. Hagar was so weakened mentally that she did not know or understand what she was doing when she signed the assignment of the savings bank books and of the shares of stock. If the right to bring an action vested in the intestate before her death, it passed on her death to her administrator. The appointment



of the administrator related back to the death of the intestate. *Wonson v. Sayward*, 18 Pick. 402, 404. *Lawrence v. Wright*, 23 Pick. 128. *Pritchard v. Norwood*, 155 Mass. 539. The plaintiff therefore was entitled to maintain an action for the original conversion.

The second request for instructions is too broad. The defendant had drawn out the deposits in the savings bank and held them as cash. For this cash, at least, an action for money had and received would lie.

We are of opinion however that the third request for instructions should have been given. The plaintiff's intestate had signed her name to the usual assignment on the back of the certificate of stock. It did not appear whether the assignment contained the name of the defendant, or whether the assignment was in blank. The defendant caused the certificate to be transferred on the books of the American Sugar Refining Company to her own name before the death of the plaintiff's intestate, and so held the stock at the time of the bringing of this action. While this would amount to a conversion of the property, if the testimony in behalf of the plaintiff was believed, it would not be a conversion into money for which an action for money had and received would lie. *Jones v. Hoar*, 5 Pick. 285. *Allen v. Ford*, 19 Pick. 217. *Brown v. Holbrook*, 4 Gray, 102. *Le Breton v. Peirce*, 2 Allen, 8. *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227. *Ladd v. Rogers*, 11 Allen, 209. *Bartlett v. Tucker*, 104 Mass. 336, 345. *Cooper v. Cooper*, 147 Mass. 370.

The plaintiff contends, in support of the proposition that the judge was right in his refusal to give the third request, that from the testimony of the defendant it appeared that the intestate told her she was to have \$2,000, and Jonas, the plaintiff, the rest, and that she had paid back all but \$1,000 of the money received. But this did not make the sugar stock money in the hands of the defendant for which an action for money had and received would lie. Indeed if the defendant's story was believed, the plaintiff's theory of the case would fall to the ground, for his contention was that at the time this conversation took place, which was at the time of the assignment of the certificate, the intestate was *non compos mentis*.

The plaintiff further contends that, as the value of the sugar



stock could be recovered on the first count, it is immaterial that the judge refused the third request for instructions. He relies upon the rule that where there is a general verdict on several counts for the same cause of action, it is enough if one count is good, citing *Baker v. Sanderson*, 3 Pick. 348, 353; *Cornwall v. Gould*, 4 Pick. 444; *Payson v. Whitcomb*, 15 Pick. 212; *West v. Platt*, 127 Mass. 367, 371; and *Pelton v. Nichols*, 180 Mass. 245. These cases are however not applicable to the one before us.

Where there are several counts for one cause of action, and a general verdict is taken without objection, and without the question being raised of the plaintiff's right to recover under the evidence on a specified count, the general verdict may be altered to conform to the good count, and judgment may be entered up. *Smith v. Cleveland*, 6 Met. 332.

In *Baker v. Sanderson* the question arose upon a motion for a new trial and a motion in arrest of judgment, because the damages were general upon both counts, and the second count stated no cause of action.

In *Cornwall v. Gould* the question arose upon a motion for a new trial, after a general verdict upon several counts. No question was raised before verdict. *Payson v. Whitcomb* is a similar case.

In *West v. Platt* the ruling requested was that there was a variance between the evidence and each of the first six counts. This was treated by the court as a request to rule that the plaintiff had not proved any one of these counts, as appears from the way the case is cited in *Pelton v. Nichols*, where the declaration had three counts, one in contract, one in tort for negligent care of a horse, and one for conversion; and the only ruling requested was that "upon all the evidence the plaintiff is not entitled to recover."

In the case before us the third request was a specific request for instructions as to the second count in reference to the sugar stock. This instruction should have been given. *Fairman v. Boston & Albany Railroad*, 169 Mass. 170, 175, 177. As the verdict is a general one, it is impossible to determine upon which count it was returned. *Lynch v. Allyn*, 160 Mass. 248. *Fairman v. Boston & Albany Railroad*, 169 Mass. 170, 178.



There remain to be considered some questions of evidence. After the defendant had testified to the signing of the orders for the money in the savings banks, and the signing of the order on the certificate of stock on September 12, 1900, and had called other witnesses who testified in her favor as to the intention of the intestate in regard to her property, the plaintiff was allowed to call witnesses who testified to declarations of the intestate, made in 1895 or 1896, that she intended her property to go to her husband; and one of the witnesses testified to a similar conversation a few months before the death of the intestate. The question in all such cases is the condition of the mind of the person doing an act at the time the act is done, but so far as previous declarations, and in some cases subsequent declarations, tend to throw light upon the condition of the mind of the person at the time of the doing of the act, such declarations are admissible. The limit of time must be left largely to the discretion of the presiding judge who has the facts of the case before him. *Shailer v. Bumstead*, 99 Mass. 112, 130. *May v. Bradlee*, 127 Mass. 414, 420. *Lane v. Moore*, 151 Mass. 87.

In the present case it appears by the declarations that the intention of the intestate made some years before the alleged gift continued down to a short time before she was taken ill; and we see no reason to doubt the admissibility of the evidence.

The last question relates to the testimony of one Ruggles as to the value of the sugar stock at the time of the conversion. The bill of exceptions states that, after giving evidence in relation thereto, he testified as to the dividends the company had paid between that time and the time of the trial. It is further stated that it had appeared previously in evidence that before that time the stock had paid quarterly dividends at the rate of twelve per cent per annum. Of course the measure of damages was the fair market value of the stock at the time of the conversion, and so the presiding judge must have instructed the jury, as no exception was taken to the charge. If the stock was not bought and sold commonly in the market, so that it was a matter of difficulty to ascertain its fair market value on a given day, other means of ascertaining its value would have to be resorted to. The bill of exceptions is silent on this point. Nor does it appear who put in the evidence as to the twelve per cent divi-



dends. For aught that appears, this evidence may have been put in by the defendant, in which case the evidence objected to might be admissible. Taking the bill of exceptions as it stands, we are of opinion that it is not sufficiently explicit to enable us to say that an error of law was committed.

The result is that the exceptions as to the money drawn from the savings banks must be overruled, and that, as to the refusal of the judge to give the third request for instructions, the exceptions must be sustained.

*So ordered.*

*H. L. Boutwell, (A. W. Levensaler with him,) for the defendant.*

*R. E. Joslin, for the plaintiff.*

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MARY A. JONES vs. MICHAEL J. COLLINS & another.

SAME vs. CITY OF BOSTON.

Suffolk. November 16, 17, 1904. — May 16, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Way, Defect in highway. Nuisance.*

For the purpose of establishing the liability of a city or town under the highway act a street remains open to travel until it has been closed by a vote of the proper authorities.

In actions against a contractor and against a city for injuries caused by the plaintiff tripping over an iron water shut-off twelve inches high and three or four inches in diameter protruding above the portion of a street where a sidewalk is to be constructed, if it appears that the contractor was constructing a new street laid out over an existing highway, doing the work under a permit from the superintendent of streets, called a permit to close, this shows that the street technically was not closed to travel by a vote of the proper authorities, and it is a question for the jury whether the contractor and the city have used reasonable care and diligence to protect the travelling public. If they have not, the contractor is liable for having created a nuisance in a public way in legal contemplation open to travel, and the city is liable under the highway act.

TWO ACTIONS OF TORT by the same plaintiff, the first against Michael J. Collins and Benjamin A. Ham, contractors, doing business under the partnership name of Collins and Ham, and the second against the city of Boston, for injuries incurred on September 19, 1896, by falling over an iron pipe or water shut-



off protruding through the portion of Columbus Avenue then being wrought for a sidewalk, that avenue having been laid out over Seaver Street in that part of Boston which formerly was West Roxbury. Writs dated November 14, 1896.

In the Superior Court the case against the contractors first was tried before *Richardson, J.* The jury returned a verdict for the plaintiff, and exceptions alleged by the defendants were sustained by this court in a decision reported in 177 Mass. 444. Later, both cases were tried together before *Bond, J.* The testimony of the plaintiff in regard to the happening of the accident was the same as at the former trial of the first case. After beginning her testimony the plaintiff was taken ill, and her cross-examination at the former trial was read to the jury by agreement. It appeared that the defendants Collins and Ham had a contract with the city of Boston for the construction of Columbus Avenue from Washington Street to Walnut Avenue by the widening of Seaver Street from forty to eighty feet, and that the widening was done on both sides of Seaver Street. Ham testified that they "had a permit from the city of Boston to close the street." At the conclusion of the evidence the judge ruled that upon the evidence neither of the actions could be maintained and ordered verdicts for the defendants. The plaintiff alleged exceptions in both cases.

*G. F. Ordway*, for the plaintiff.

*E. R. Anderson*, (*A. T. Smith* with him,) for Collins and Ham.

*S. M. Child*, for the city of Boston.

LORING, J. The learned counsel for the plaintiff has contended that the case which was proved in the second trial at which the exceptions now before us were taken is not within the rule laid down when the first of these two cases was here before, (*Jones v. Collins*, 177 Mass. 444,) and also laid down in *Bliss v. Deerfield*, 13 Pick. 102, and *Compton v. Revere*, 179 Mass. 413. He contends that the cases now before us come within the rule laid down in *White v. Boston*, 122 Mass. 491; *Butman v. Newton*, 179 Mass. 1; *Leonard v. Boston*, 183 Mass. 68; *Sampson v. Boston*, 184 Mass. 46; *Hyde v. Boston*, 186 Mass. 115.

The distinction between *Jones v. Collins* on the one hand and *Sampson v. Boston*, 184 Mass. 46, and *Hyde v. Boston*, 186 Mass.



115, on the other hand is this: Where a public way has been closed to public travel by vote of the proper public authorities, it becomes the duty of the city or town to give proper notice thereof, if it wishes to put an end to its statutory liability under R. L. c. 51, §§ 17, 18, for the time being, namely, while the way is closed. If it does give such notice its statutory liability is ended for the time being, as was held in *Jones v. Collins*, 177 Mass. 444. On the other hand, in cases where no vote has been passed to close the way and a pile of stones or an excavation is lawfully placed or made in it, the city or town is liable if it had notice or might have had notice of the defect, unless it had used reasonable care and diligence to protect the travelling public from the pile of stones or the excavation. *Sampson v. Boston*, 184 Mass. 46, *Hyde v. Boston*, 186 Mass. 115, are cases of this class.

If barriers are relied upon in a case of one class and the question of their sufficiency is raised, a decision on the sufficiency of barriers in a case belonging to the other class is beside the point. The purpose of the barriers and the office served by them are quite different in the two classes of cases.

Where the question is whether the statutory liability of a town has come into existence in case of a public way which has been laid out and at least substantially completed, (*Bliss v. Deerfield*, 13 Pick. 102, *Drury v. Worcester*, 21 Pick. 44, *Commonwealth v. Boston & Lowell Railroad*, 12 Cush. 254, 259, *Compton v. Revere*, 179 Mass. 413,) or where the way has been closed by vote after it once has been opened, (*Jones v. Collins*, 177 Mass. 444,) the question is a question of notice express or implied. See especially Shaw, C. J. in *Drury v. Worcester*, 21 Pick. 44; Barker, J. in *Jones v. Collins*, 177 Mass. 444, 448. If the town has attempted to give notice by the erection of barriers, the question is whether the barriers alone or the barriers coupled with a notice on them are sufficient notice.

But where without question the way was at the time a public way open to public travel and the statutory liability of the city or town was then in existence, the question is the question of whether reasonable care and diligence has been used to protect the public by barriers against the pile of stones or the excavation temporarily in the way, and the question whether the bar-



riers erected are sufficient for that purpose is a quite different question. That was the question which was up in *Sampson v. Boston*, 184 Mass. 46, and *Hyde v. Boston*, 186 Mass. 115, cited by the plaintiff here. To these cases may be added the earlier cases of *Doherty v. Waltham*, 4 Gray, 596, and *Myers v. Springfield*, 112 Mass. 489. *Martin v. Chelsea*, 175 Mass. 516.

In *Howard v. Mendon*, 117 Mass. 585, although the barriers and notice assumed that the way had been closed, there does not seem in fact to have been a vote to close the way. Under those circumstances the jury were told that it was the duty of the defendant town to guard the mound of earth in question by a sufficient guard or barrier at the place where the mound was, or by a sufficient fence or barrier across the way at the end of that part of the way which was under construction. That is to say, the case was treated in the charge as a case of the second class, and the charge was upheld on the authority of two previous cases of that class. *Doherty v. Waltham*, 4 Gray, 596. *Myers v. Springfield*, 112 Mass. 489.

*White v. Boston*, 122 Mass. 491, is the case mainly relied on by the plaintiff in the case at bar. Apparently there was no vote in that case closing the street to public travel, and it is expressly stated in the bill of exceptions in that case that the excavation which caused the injuries there complained of "was made a day or two before the accident happened, in the course of repairs of the street, but by whom made or for what purpose did not distinctly appear." For all that appeared the excavation in question was made by a contractor, without action by the city of Boston closing the street to travel; if so the case was a case where a contractor was doing work in a street which was left open to travel and the statutory liability of the city was not suspended. In other words, the case was a case of the second class. Under these circumstances what was said in the opinion must be taken to have been said of a case where the way has not been closed by the proper authorities. No cases are referred to in the opinion, but it appears from an examination of the original papers that the Massachusetts cases cited by the defendant were all of them cases where there had been no vote closing the public way, namely, *Doherty v. Waltham*, 4 Gray, 596; *Myers v. Springfield*, 112 Mass. 489; *Howard v.*



*Mendon*, 117 Mass. 585. The case from Maine, the only other case cited by him, was not a case where the public way had been closed to travel.

The only remaining case cited by the plaintiff which need be noticed is the case of *Leonard v. Boston*, 183 Mass. 68. As shown by the original papers that was not a case where the public way had been closed, but a case where a permit was given "to open, occupy and use a portion not exceeding fifty feet in length, by sidewalk and six feet in width, of Dorchester ave. street, in front of" the blacksmith's shop referred to in the report, which permit was issued by the superintendent of streets "in accordance with the revised ordinances of the city of Boston." That is not a vote by the proper authorities closing the street to travel.

The only express provision made by statute for closing a public way to travel is in case specific repairs are ordered to be made by county commissioners. St. 1839, c. 90, now R. L. c. 48, § 10. But the power of closing public ways to travel is not confined to that case.

In the case at bar the defendant Ham testified "that he had a permit from the city of Boston to close the street," and there was no further evidence on this point. By a permit to close a street to travel is probably meant a permit to occupy a street under the revised ordinance which was before the court in *Leonard v. Boston*, 183 Mass. 68. At any rate it cannot be taken to be a vote by the proper authorities closing the street to public travel. In the former case of *Jones v. Collins*, 177 Mass. 444, this permit was not put in evidence or even referred to.

It did appear there, as it has appeared here, that although Seaver Street "was never discontinued by any formal vote or order of the city authorities, . . . the board of street commissioners of the city of Boston passed an order for the laying out of Columbus Avenue and extending the same from Washington Street to Walnut Avenue over the whole of Seaver Street, and for widening Seaver Street and changing its name to Columbus Avenue." The new lay out did not work a discontinuance of Seaver Street. *Howard v. Mendon*, 117 Mass. 585. *Hobart v. Plymouth*, 100 Mass. 159, 165.

It seems to have been assumed in *Jones v. Collins*, 177 Mass.



444, that this order of laying out was impliedly an order closing Seaver Street to travel during construction. But a permit, although called a permit to close, implies that the way has not been technically closed to public travel by the proper authorities. In view of the permit in evidence here, it must be assumed that the street was not closed to travel on the evidence in the case, and it is not necessary to consider whether the assumption made in the former case was rightly made or not.

As the cases now before us stood on the evidence they must be dealt with as cases where the statutory liability of the defendant city was still in existence, and the question for trial in the case against the city was whether the defendant city had used reasonable care and diligence to protect the travelling public against the defect in Seaver Street or Columbus Avenue caused by an iron water shut-off twelve inches above the sidewalk and three or four inches in diameter; and we are of opinion that the jury could find that it had not done so.

At the argument counsel for the defendant contractors contended that directing a verdict for them was right because the statutory notice was given to the defendant city only. We assume that counsel referred to the provision that notice shall be given "to the county, city, or town or person by law obliged to keep said way" in repair. R. L. c. 51, § 20. The defendant contractors in the case at bar were not persons "by law obliged to keep said way" in repair. The duty of keeping Seaver Street or Columbus Avenue in repair was on the city of Boston. The defendants were liable for having in fact created a nuisance in a public way which was in legal contemplation open to travel.

*Exceptions sustained.*



## GEORGE S. ALLEN vs. COMMONWEALTH.

Worcester. February 23, 1904. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.*Damages. West Boylston. Words, "Business", "Established business."*

The owner of a farm in West Boylston of about fifty acres, which has been the only means of livelihood for himself and his family, who for many years has carried on the business of farming by selling the surplus produce of his farm to persons in the village of Oakdale in the town of West Boylston, although he has had no regular route or customers and nothing in the nature of a good will, may be found by the commissioners appointed under St. 1895, c. 488, to have owned "an established business on land in the town of West Boylston" within the meaning of the provisions of § 14 of that statute.

PETITION, filed in the Supreme Judicial Court for the County of Worcester on May 15, 1903, under St. 1895, c. 488, § 14, for the determination of damages, alleging that on April 1, 1895, the petitioner owned an established business on land in the town of West Boylston, which was decreased in value and destroyed by the carrying out of St. 1895, c. 488, and that the petitioner was unable to agree with the board of commissioners appointed under that act as to the amount of damages to be paid for such injury.

The commissioners made a report stating the facts which appear in the opinion, and finding, that, if on the facts reported the petitioner owned an established business on land within the meaning of the act, such business was damaged and decreased in value by the carrying out of the act in the sum of \$150. Otherwise the commissioners found for the Commonwealth.

The case came on to be heard upon the report of the commissioners before *Hammond, J.*, who reserved it for determination by the full court of the question whether upon the facts set forth in the commissioners' report it was competent for them to find that the petitioner had an established business within the meaning of St. 1895, c. 488, § 14.

The case was submitted on briefs at the sitting of the court in



February, 1904, and afterwards was submitted on briefs to all the justices.

*J. S. Lynch*, for the petitioner.

*R. A. Stewart*, Assistant Attorney General, & *F. T. Field*, for the Commonwealth.

MORTON, J. The question in this case is whether the petitioner owned "an established business on land" within the meaning of St. 1895, c. 488, § 14. So much of the section as is material is as follows: "In case any individual or firm owning on the first day of April in the year eighteen hundred and ninety-five an established business on land in the town of West Boylston, whether the same shall be taken or not under this act, . . . shall deem that such business is decreased in value by the carrying out of this act, whether by loss of custom or otherwise, and unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined" etc.

The petitioner owned on April 1, 1895, and had owned for a good many years, a small farm in West Boylston, consisting, it is said, of about fifty acres, which he carried on, and on which he lived and supported himself and family. He had no other business. He raised hay, grain, apples and vegetables but not in large quantities, and kept a cow, a horse, some hens, and a few hogs and made each year a few barrels of cider from apples raised on the farm. The hay that was not consumed, and the eggs, vegetables, cider and milk that were not required for the support of the family were sold in the village of Oakdale in West Boylston, and he occasionally sold a hog to the local butcher. He had no regular route or customers for the sale of the hay, eggs, vegetables, milk and cider. It does not appear, and is perhaps not material, of how many persons his family consisted, nor how much hay and other produce or how many eggs and hogs he sold. The village of Oakdale was destroyed by the construction of the reservoir, and the petitioner brings this petition to recover the damages thereby caused to his business.

The act under which the petition is brought is entitled, "An Act to provide for a Metropolitan Water Supply," and provides for the construction of a reservoir, the effect of which will be to submerge certain towns and villages and to destroy a large



amount of property and to interfere very seriously with, if not destroy, in many cases business. Ordinarily the damage done to a person's business by the exercise of the right of eminent domain is not a matter for which he is entitled to compensation. But in the present case the Legislature has shown a disposition to deal liberally with those who would or might be injured by the carrying out of the act. In addition to providing compensation for real estate taken, and for real estate not taken but directly or indirectly decreased in value, the act provides that in certain cases individuals and firms shall be compensated for damage done to their business whether the land on which it is established is taken or not, and whether the business is decreased in value by loss of custom or otherwise. By subsequent acts these provisions were extended to the towns of Sterling, Boylston, and the part of Clinton within the limits of the reservoir. St. 1897, c. 445. St. 1898, c. 551. St. 1901, c. 505. By another act the Legislature went so far as to provide that in certain cases the employees of corporations, partnerships and individuals in West Boylston should be entitled to compensation when thrown out of work by the taking of the property of their employers under the act. St. 1896, c. 450. The purpose of the Legislature to deal liberally with those affected by the construction of the reservoir is thus shown and the provisions now before us should be construed in accordance with the intention thus manifested.

The word "business" is of large significance and "denotes the employment or occupation in which a person is engaged to procure a living." *Goddard v. Chaffee*, 2 Allen, 395. That farming is a business is plain, (*Snow v. Sheldon*, 126 Mass. 332,) and there is nothing in the statute that excludes it any more than any other business from its operation. It is manifest, also, we think, that the petitioner was engaged in the business of farming. That was the means, and, so far as appears, the only means whereby he procured a livelihood for himself and his family. The more difficult question is whether, as he carried it on, it was "an established business" within the meaning of the statute. That it was a business "on land in the town of West Boylston" would seem to hardly admit of question. In this connection it is to be noted that the business of farming as carried on by the petitioner included not only the raising of farm prod-



ucts but the selling of a portion of the same. As a farmer he raised and sold farm products. He had owned and had thus carried on the farm for many years, fifteen it is said in the brief, and so far as he was concerned the business was an established business. It had got beyond the stage of experiment, and had become his settled and only occupation, and for aught that appears furnished a comfortable living for himself and his family. Any element of uncertainty or chance that there may have been about it at any time had disappeared, and he could and did depend on it from year to year for a livelihood for himself and family. If the persons in Oakdale, to whom he sold his surplus produce, had gone to his farm and bought there, or if he had had a shop in the village, there can be no doubt, we think, that he would have had an established business on land in West Boylston within the meaning of the act. It is said, however, that he had no regular route or customers and that there was nothing in the nature of a good will, such as goes, for instance, with a physician's practice; that, in short, there was nothing in the nature of property in the business as carried on by the petitioner and that it was only such cases for which the Legislature intended to provide. But this case would seem to show that there may be an established business without a regular route or regular customers, or anything in the nature of a good will. If these things are present, in any given case, they show, beyond question, that the business is an established business. But the words have no settled meaning (*Ex parte Breull*, 16 Ch. D. 484), and are to be construed with reference to the circumstances of each particular case. The petitioner had been carrying on the same business, in the same locality, and on and from the same farm for fifteen years. How can it be said that the business was not an established business? Presumably the village of Oakdale was a small place and he may have found it more to his advantage to sell where and as he could, than to adhere to a fixed route and regular customers, and so an established relation may have existed between him and the citizens of that village as to the sale of his farm products. It also is to be noted in this connection that by the terms of the act compensation is to be given whether the damage occurs by loss of custom or otherwise. The petitioner's farm was, as said in *Earle v. Commonwealth*,



180 Mass. 579, 583, of a doctor's office, the "locally established centre" from which he distributed what he had to sell, and his business could, therefore, be fairly said to have been an established business on land in West Boylston. The fact that he did not raise things in large quantities, or that the farm was a small one has, of course, no tendency to show that the business was not an established business. The Legislature did not mean that every one in the towns of West Boylston, Boylston, Sterling and Clinton who should be injured in his business or occupation by the construction of the reservoir should receive compensation therefor. But by the building of the reservoir certain towns and villages would be altogether destroyed and the inhabitants scattered. Naturally there would be cases in which individuals derived support for themselves and their families in whole or in part from supplying the wants of the people living in the towns and villages that would be thus broken up, and whose business would be very seriously interfered with, if not altogether destroyed. Such cases might well appeal to the consideration of the Legislature, and we think that it was the object of the Legislature to provide for them. By the use of the word "established" it intended to exclude cases where the business had not an element of fixity and permanence, and by the use of the words "on land in the town of West Boylston" to confine the right of recovery to cases which were local in their character. A majority of the court think that the petitioner's case comes within the scope of the statute as thus defined and that he is entitled to recover, and that judgment should be entered in his favor for \$150, the amount of the damage found by the commissioners, with interest and costs.

*So ordered.*



RUFUS B. FOWLER & others vs. GEORGE F. BROOKS  
& others.

Worcester. October 4, 5, 1904. — May 17, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Mandamus. Municipal Corporations. School and School Committee.*

A petition of six taxpayers and citizens of a city for a writ of mandamus is not the proper remedy to determine whether, as alleged in the petition, the duty of caring for the public schoolhouses of the city belongs to the school committee and has been usurped by the mayor and city council, or whether it legally is vested in the last named public officers.

HAMMOND, J. Six taxpayers and citizens of the city of Worcester bring this petition for mandamus to compel the school committee of that city to assume the care of the public schoolhouses. It is not shown that the petitioners have any children attending the public schools, or that they have any interest in the matter except that which arises from the fact that they are such taxpayers and citizens.

So far as material to the ground of our decision the petition may be briefly summarized as alleging that the duty of caring for the public schoolhouses of the city rests legally upon the school committee, but that the performance of the duty is usurped by the mayor, city council, and superintendent of streets, who without right are taking the care and propose to continue to do so; and it prays that a writ of mandamus shall issue, commanding the school committee to do their duty in the premises and the usurpers to stop their usurpation.

In a word, the case as shown by the petition is that certain public bodies are usurping powers of the school committee with reference to the care of schoolhouses, and the petitioners want this usurpation stopped by a writ of mandamus. The school committee have answered in a body, admitting in substance that the duty of caring for the schoolhouses rests upon them, but declaring that the usurpers stand in the way so that they cannot discharge that duty; and they await the order of the court.



Various motions to dismiss and answers including demurrers have been filed by the other respondents, in relation to which the petitioners have filed several motions, the whole resulting in a fairly complicated state of preliminary questions having but little, if any, bearing upon the real question at issue, which is whether or not the duty of caring for the schoolhouses rests by law upon the school committee.

We have not found it necessary to consider in detail the various questions arising upon the preliminary pleadings, because we are of opinion that for fundamental reasons the bill does not present a case calling for mandamus proceedings.

It is plain from a reading of the bill that the duty of caring for the schoolhouses is exercised by the mayor and city council, exercising their functions *de facto* and under a claim of right. In such a case mandamus which lies to compel the performance of a duty will not compel the admission of another claimant, or determine the disputed question of duty. The right of the alleged usurpers must be settled by some other proceeding in the nature of *quo warranto* or otherwise. See the rule stated in High, Ex. Leg. Rem. § 49, and the cases cited.

It is true that in this Commonwealth this rule has not been followed where a claimant of a public office seeks to oust an incumbent. Mandamus in such a case is held to lie. See the subject mentioned in *Strong, petitioner*, 20 Pick. 484, and the practice followed in *Conlin v. Aldrich*, 98 Mass. 557. See also, among other cases, *Putnam v. Langley*, 133 Mass. 204, and *Russell v. Wellington*, 157 Mass. 100. Of this practice, however, Field, C. J. says in *Luce v. Board of Examiners*, 153 Mass. 108, 111: "The use of the writ of mandamus to try the title to an office, and to put one person out of and another person into an office, is undoubtedly unusual, and opposed to the weight of authority in other jurisdictions."

In the present case the question is not which of two persons is rightfully entitled to a public office, but upon which of several public officers rests the duty of performing a certain public function. To apply to such a case the rule which has been acted upon in this Commonwealth in cases where the sole question is which of two men is lawfully entitled to an office, is to extend it further than we have yet done. In view of the fact that the



principle involved in our practice in such cases is opposed to the great weight of authority, we are not inclined to extend it beyond the limits to which it already has been carried. This is not a proper case for the writ of mandamus.

*Petition dismissed.*

*J. S. Gould, (M. M. Taylor with him,) for the petitioners.*

*A. P. Rugg, (J. F. Humes & A. H. Bullock with him,) for the respondents other than the members of the school committee.*

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### D. WEBSTER KING vs. MURPHY VARNISH COMPANY.

Suffolk. November 14, 1904. — May 17, 1905.

Present : KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Landlord and Tenant. Covenant.*

A lease contained a covenant that "no act or thing shall be done upon the said premises, which may make void or voidable any insurance of the said premises or building against fire, or may render any increased or extra premium payable for any such insurance." The lessee who was engaged in the varnish business put into the insured building large tanks for the storage of varnish. Later the insurance rate on the building was raised on account of the presence of the tanks of varnish, and the lessor having paid the extra premiums sued the lessee on the covenant. *Held*, that the plaintiff could recover the amount of the extra premiums thus paid by him, even if when he made the lease he had known the extent of the defendant's business and his manner of conducting it elsewhere by storing varnish in large tanks, there being nothing to limit the application of the covenant to risks incurred by a change in the defendant's manner of conducting his business. The plaintiff was not shown to have known these things.

MORTON, J. This is an action of contract to recover damages for the breach of a covenant by the defendant in a written lease from the plaintiff to him of certain premises on Battery-march Street in Boston. The covenant is as follows: "No act or thing shall be done upon the said premises, which may make void or voidable any insurance of the said premises or building against fire, or may render any increased or extra premium payable for any such insurance." The defendant is engaged in the varnish business and put into the premises large tanks for the storage of varnish. Subsequent thereto the insurance rate on



the plaintiff's building was increased and he was obliged to pay more for insurance on the building. This action is brought to recover for the additional sum thus paid. The case is here on exceptions by the defendant to the refusal of the judge to rule as requested by it that the plaintiff could not recover, and to a finding for the plaintiff. We think that the ruling and finding were right.

The defendant's contention is in substance, as we understand it, that the covenant is to be construed as applying to the use of the premises for the defendant's business as carried on by it at the time when the lease was executed, and as meaning that no change should be made by the defendant in the method of carrying on its business which would cause any increase in the rate of insurance on the plaintiff's building. And it says that the storing of varnish in tanks in other premises occupied by it was and had been for many years one of the methods in which it carried on its business, and that it was so carrying it on at the time when the lease was executed, and that the increase in the rate of insurance was not due to any change by it in its method of doing business, but to a change of opinion on the part of the board of underwriters as to the risk attending the business as carried on by the defendant, and that it is not, therefore, liable under the covenant for any sums paid by the plaintiff on account of the increase in the rate of insurance. But it is to be observed, if material, that though the plaintiff knew that the defendant was engaged in the varnish business, there is nothing to show that either he or his son, through whom the negotiations for the lease were carried on, knew the extent of the defendant's business, or how it was conducted, or that the defendant stored varnish in large tanks on premises occupied by it. To give the covenant, therefore, the construction contended for by the defendant would be going beyond what the lessor could be held to have reasonably contemplated. But we think that the covenant cannot properly be construed, and should not be construed as the defendant contends. There is no provision in the lease, express or implied, as to the nature of the business to be carried on upon the premises. For aught that appears the defendant could use them for any purpose to which they were adapted. There is nothing in the covenant which limits its application to



an increase due to a change by the defendant in the mode of carrying on the business in which it was engaged, and for which it may be assumed that it intended, with the knowledge of the plaintiff, to use the premises. The covenant is in general terms, and if it operates as a restriction upon the use of the premises by the defendant, as it has been accustomed to use premises occupied by it, that is no reason why it should not be enforced. It provides in express terms that no act or thing shall be done by the lessee which may make any insurance on the building against fire void or may render any increased premium payable for such insurance. We see no reason for limiting the natural import of the language used, and we think that the act of the defendant in storing varnish in tanks on the premises comes within its terms if thereby the insurance on the plaintiff's building was increased. The cases of *Quincy v. Carpenter*, 135 Mass. 102, and *Browne v. Niles*, 165 Mass. 276, cited by the defendant are materially different from this case. In the first case the question involved was the construction of a receipt that had been given for extra insurance, and in the second, the lease was made with a full knowledge on the part of the lessors of the business that had been carried on upon the premises and of the use to which the premises were to be put in continuing the business, and the question was whether the lessors were entitled to an injunction restraining a nuisance thus caused; and the court held that they were not, saying at the same time that the plaintiffs could resort to an action for damages on the covenant of the lessees to pay all damages for any nuisance made or suffered by them on the premises.

*Exceptions overruled.*

*A. H. Russell*, for the defendant.

*H. W. Barnum*, for the plaintiff.



## HENRY H. CUMMINGS &amp; another vs. RUSSELL S. HOLT.

Suffolk. November 15, 1904. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; LORING, JJ.

*Practice, Civil, Exceptions.*

An exception will not be sustained to an instruction which even if erroneous did the excepting party no harm.

MORTON, J. This is an action of contract upon an account annexed consisting of thirteen items amounting to \$102.47, the last item being the footing or total. After the suit was begun the father of the defendant went to the plaintiffs' office when the bookkeeper was there alone and paid her \$3.03, the amount of the first item, and took from her a receipt for the work described in that item, nothing being said by the bookkeeper or the father about interest or costs. The defendant admitted his liability at the commencement of the action for this item, but the testimony was conflicting as to his liability for the other items. The jury returned a verdict for the plaintiffs and assessed damages in the sum of \$113.81. The case is here on exceptions by the defendant to so much of the charge as instructed the jury that the effect of the payment of the first item after suit was begun was to entitle the plaintiffs to a verdict in their favor under any circumstances for nominal damages. But the judge also instructed the jury that while their verdict should be for the plaintiffs for nominal damages if they thought that the plaintiffs were only entitled to recover on the item that had been paid, on the other hand, if they thought that the plaintiffs were entitled to recover the entire amount or a substantial portion of their claim then they should render a verdict for such larger sum. It is evident that the jury thought that the plaintiffs were entitled to recover the entire amount or a substantial portion of it, and therefore that the instruction objected to, even if erroneous, did the defendant no harm. If it could not have done the defendant any harm then no reason appears for disturbing the verdict or sustaining



the exceptions. *Smith v. Kimball*, 105 Mass. 499. *Cunningham v. Parks*, 97 Mass. 172, 175.

*Exceptions overruled.*

*J. E. Crowley*, for the defendant.

*H. L. Boutwell*, for the plaintiffs.

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SAMUEL D. JENNESS vs. HENRY C. SHRIEVES.

Suffolk. January 10, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Attachment. Mortgage, Of chattels. Trustee Process. Conversion.*

Statutory methods of attaching mortgaged personal property discussed by LORING, J.

Mortgaged personal property in the hands of a bailee of the mortgagor cannot be attached by summoning the bailee by trustee process.

Mortgaged personal property cannot be attached as if unincumbered and the mortgagee summoned to answer questions under R. L. c. 167, § 74, when the property is in the possession of the mortgagee.

Where mortgaged personal property has been taken by the mortgagee for breach of condition and is in the hands of an auctioneer for foreclosure sale, a seizing of the property by an officer on an attempted attachment under R. L. c. 167, § 74, which is void because the property is not in the possession of the mortgagor, is a conversion.

TORT, by the mortgagee of certain articles of personal property under a mortgage made by Carrie J. Coombs against a constable of the city of Boston, for an alleged conversion of the property. Writ in the Municipal Court of the City of Boston dated August 5, 1902.

On appeal to the Superior Court the case was tried before Wait, J. It appeared that before June 4, 1902, Carrie J. Coombs was the owner of the articles of personal property in question which then were in a building numbered 377 on Columbus Avenue in Boston. On that day she mortgaged them to the plaintiff to secure the payment of \$100. The mortgage was conditioned not only for the payment of the \$100 but also that the mortgagor should not, except with the consent in writing of the grantee or his representative, attempt to sell or remove from



377 Columbus Avenue the articles or any part of them. It also provided that the mortgagor should have possession until default, but that after such default the grantee or those claiming under him might take immediate possession of the property. Ten days after the making of the mortgage the mortgagor removed the articles from 377 Columbus Avenue without the consent in writing of the plaintiff, the mortgagee, and placed them in the custody of one Edna F. Manchester where they remained until taken out of her possession by the plaintiff on August 1, 1902, as follows: On July 1, 1902, one Freeman took out a trustee writ against the mortgagor as defendant and the plaintiff and Edna F. Manchester as trustees, which action was still pending when the present action was brought. On August 1, 1902, the plaintiff took possession of the mortgaged articles and put them in the hands of an auctioneer for sale. On the same day a special precept was issued by the Superior Court, while the action begun by trustee process was pending, directing the officer to whom it was addressed "to attach the personal property of said defendant to the value of two hundred dollars in the hands of defendant as mortgagor aforesaid" and to "summon the said trustee, Samuel D. Jenness, . . . to appear before our justices of our said court . . . on Saturday, the ninth day of August, A. D. 1902, . . . to answer such questions as may be put to him by the court, or by its order, touching the consideration of said mortgage and the amount due thereon." The officer's return on this writ was as follows: "By virtue of this writ, I this day attached certain goods and chattels as the property of deft. and placed a keeper in charge of same, and thereafter on same day I delivered in hand to the trustee, Samuel D. Jenness, an attested copy of this precept for his appearance at court as within directed, and thereafter, on same day, I removed said keeper and stored said property, and I now hold said property in my possession subject to further order of court." It also appeared that on August 2 the plaintiff attempted to sell the goods at auction, and was prevented from doing so by the defendant's keeper, and that the articles in question were still in the possession of the defendant.

On August 5, 1902, the present action was brought for the alleged conversion of the property by the defendant in taking possession of it on August 1 and preventing its sale on August 2.



The defendant asked the judge to rule as follows:

1. Upon all the evidence, the plaintiff cannot maintain this action.

2. The action in which the plaintiff and one Manchester were summoned as trustees being still pending, this action cannot be maintained by the plaintiff.

3. If the jury find that the articles sued for were in the possession of Manchester at the time of the writ, *Freeman v. Coombs* and trustees, the plaintiff's removal of the articles from that possession was illegal, during the pendency of that action, and the defendant was justified in taking the articles, and is not liable in this action.

4. If the jury find that no notice, as required by law, was given by the plaintiff as mortgagee to the owner, or person in possession of the articles sued for, the defendant is not liable in this action.

5. The intention to foreclose the mortgage not being recorded as required by R. L. c. 198, § 5, the plaintiff had not any possession, and the defendant is not liable in this action.

6. If the jury find that the defendant attached the articles stated in the declaration while in the possession of a party other than the plaintiff, the defendant was justified in his attachment by the precept and his return thereon, and is not liable to the plaintiff in this action.

7. Upon all the evidence in this action the defendant is justified in taking the goods as constable under the writ and special precept in the action *Freeman v. Coombs* and trustees, and by reason thereof is not liable in this action.

The judge refused to rule as requested and directed the jury to return a verdict for the plaintiff. The jury assessed damages in the sum of \$65; and the defendant alleged exceptions.

*H. Dunham*, (*G. F. James* with him,) for the defendant.

*A. W. Eldredge*, for the plaintiff.

LORING, J. The defendant's first contention is that the possession which the plaintiff got by taking the furniture from Manchester was wrongful, and that a wrongful possession will not support an action of trover. His argument in support of this contention is that after Manchester had been served with the trustee writ the furniture held by her was *in custodia legis*,



and the plaintiff could not rightfully get possession by taking it from her, citing in that connection *Rockwood v. Varnum*, 17 Pick. 289, Shaw, C. J. in *Allen v. Hall*, 5 Met. 263, 265. See *Martin v. Bayley*, 1 Allen, 381, 383.

That argument rests on the assumption that the mortgagor's interest in the furniture was attached by serving the trustee writ on Manchester. But that assumption is incorrect. The interest of a mortgagor in mortgaged personal property cannot be attached by trusteeing a bailee of that property who holds for the mortgagor. The only way in which the mortgagor's interest in such property so situated can be attached is by attaching it as if it were unincumbered on a writ of summons and attachment under R. L. c. 167, § 74.

Before St. 1829, c. 124, the mortgagor's interest in personal property under mortgage could not be attached on mesne process, *Badlam v. Tucker*, 1 Pick. 389, or taken on execution. *Lyon v. Coburn*, 1 Cush. 278.

By St. 1829, c. 124, two methods were provided for reaching the mortgagor's interest in mortgaged personal property by way of mesne attachment. One was, where the mortgaged personal property was in the hands of the mortgagee, to serve the mortgagee with a trustee writ. This is now re-enacted in R. L. c. 189, §§ 60, 61 and 62. The other method was to attach the personal property under a writ of summons and attachment as the property of the mortgagor, provided the person for whose benefit the attachment was made should first pay or tender to the mortgagee the full amount of the demand for which said property was mortgaged, following the suggestion made in *Badlam v. Tucker*, 1 Pick. 389, 399, 400. This method was changed in the Rev. Sts. c. 90, § 78, so as to allow mortgaged personalty to be attached as if it were unincumbered before the mortgage debt was paid, the mortgagee's rights being preserved by a provision that the attachment should be dissolved if the attaching creditor failed to pay the mortgage debt upon a demand for it being subsequently made by the mortgagee. The making of a demand by the mortgagee for payment of the mortgage debt was further regulated by St. 1843, c. 72, § 3, and St. 1844, c. 148, § 1. These provisions are now found in R. L. c. 167, §§ 69-73.

A third method for reaching the mortgagor's interest in mort-



gaged personal property was created by St. 1844, c. 148, §§ 2-6, to wit: In case the mortgaged personal property is in the hands of the mortgagor it may be attached as unincumbered and the mortgagee summoned. If the attaching creditor pursued this method he had a right to try the validity of the mortgage. Here also the mortgagee's interest is preserved by a provision that the attachment shall be dissolved if the mortgage debt is not paid. This is now re-enacted in R. L. c. 167, §§ 74-78.

Unless one of these three statutory methods of attaching the mortgagor's interest in mortgaged personal property is pursued, that interest cannot be reached on mesne process. No one of these was pursued in the case at bar. When the writ was first taken out the personal property was in the hands of a bailee of the mortgagor, and therefore could be attached only under a writ of summons and attachment as if unincumbered. In place of pursuing that method the plaintiff undertook to attach it by summoning the bailee in a trustee writ. It is only where the mortgaged personalty is in the hands of the mortgagee that the mortgagor's interest can be reached by summoning the person having possession thereof as a trustee in trustee process. In the case at bar nothing was effected by summoning Manchester as a trustee, and the plaintiff's right to take possession was in no way affected thereby. The defendant's first contention wholly fails.

The defendant's second contention is also without foundation, namely, that the defendant was justified by the special precept used on August 1, 1902. The special precept recites that the mortgaged property is in the hands of the mortgagor, but is mortgaged to the plaintiff, and directs the defendant to appear "to answer such questions as may be put to him by the court, or by its order, touching the consideration of said mortgage." Under it the defendant took possession of the property as unincumbered, and delivered a copy of the precept to the mortgagee. In other words, this special precept authorized an attachment in the third method mentioned above, now R. L. c. 167, § 74. But the validity of such an attachment depends upon the mortgaged property being in fact in the possession of the mortgagor. *Drysdale v. Wax*, 175 Mass. 144. *Porter v. Warren*, 119 Mass. 535. At the time this attachment was made in



the case at bar the property was in the possession of the mortgagee, and this proceeding was void.

The facts proved showed a conversion. *Boynton v. Warren*, 99 Mass. 172. *Porter v. Warren*, 119 Mass. 535. *Duggan v. Wright*, 157 Mass. 228.

*Exceptions overruled.*

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RICHARD HILL vs. IVER JOHNSON SPORTING GOODS  
COMPANY.

Suffolk. January 11, 1904. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, Employer's liability.*

It is no evidence of a defect in the ways, works or machinery of an employer that the gate of a freight elevator car pushed up by another employee of the defendant fell on the head of the plaintiff, as he stepped out of the car, because the catch at the top of the car although it gave the usual click failed to hold the gate when pushed up, if it appears that until the time of the accident the catch had worked well and its failure to work properly on that occasion was not explained.

TORT for personal injuries incurred in the employ of the defendant as described in the opinion, with a first count at common law alleging defective machinery, a second count under the employers' liability act alleging a defect in the ways, works or machinery of the defendant, and a third count under the same act alleging negligence of a superintendent. Writ dated February 2, 1901.

At the trial in the Superior Court *Pierce, J.* ordered a verdict for the defendant on all three counts; and the plaintiff alleged exceptions.

*C. G. Morgan & A. H. Morse*, (*B. Wendell, Jr.* with them,) for the plaintiff.

*S. R. Spring*, for the defendant.

LORING, J. In this case an employee of the defendant was hurt by an elevator gate striking him on the head as he stepped out of the elevator car. The defence is that the plaintiff failed



to prove negligence on the part of the defendant. The count relied on by the plaintiff is the second founded on R. L. c. 106, § 71, cl. 1, for negligence on the part of the defendant in not keeping its ways, works or machinery in order.

It appeared that in order to open the elevator gate it had to be thrown up to the ceiling of the car. When thrown up it caught on an iron catch on the car, and when it caught it gave a click. At the time of the accident it was thrown up by another employee, it gave the proper click, and then, without warning, fell on the plaintiff. This was all the evidence, with the exception that the plaintiff testified that it worked properly when used by him shortly before the accident.

The defence is well taken. What the plaintiff proved was that up to the time of the accident the machinery complained of had worked well. Why it worked badly at the time of the accident was not explained. There was not evidence even that it was found to be defective on an examination being made after the accident.

There is no resemblance between the case at bar and *White v. Boston & Albany Railroad*, 144 Mass. 404, where a lamp shade fixed to the ceiling of a passenger car fell on a passenger, and no explanation was given. Apart from the fact that the degree of care owed by a carrier of passengers is the highest, the plaintiff there had a case if the shade had been negligently placed, the train negligently run, or the defendant had been negligent in using a defective shade, while in the case at bar the plaintiff had to show that the defendant had been negligent in allowing the machinery of the gate to become out of repair.

*Exceptions overruled.*



## EDWARD ATKINS vs. CITY OF BOSTON.

## MAUDE D. SNOW vs. SAME.

Suffolk. January 11, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, &amp; BRALEY, JJ.

*Tax, Assessments for benefits.*

On a petition for damages for the taking of an easement in a strip of land by the city of Boston under St. 1897, c. 426, as amended by St. 1899, c. 450, for locating anew the channel of a watercourse for sewerage purposes, if the city has neglected to lay a betterment assessment as it might have done under the last named statute, it cannot set off the special benefit to the petitioner against the petitioner's claim.

TWO PETITIONS, filed January 3, 1902, by owners of land in that part of Boston called Brighton, for determination of damages for the taking by the city of Boston of an easement for sewerage purposes as described below.

In the Superior Court the cases were tried before *Bishop, J.*, who reported them for determination by this court on the terms named below. The following statement of the cases is taken from the opinion of the court:

On June 27, 1899, the board of street commissioners of the city of Boston, after locating anew the channel of a watercourse called Faneuil Valley Brook and taking for that purpose an easement in a strip of land fifteen feet wide belonging in part to the plaintiffs and in part to the defendant, made this taking: "This board do hereby take for the city of Boston, the right to maintain said new channel and other sewerage works in said lands as said board deem said right to be necessary for the sewerage works of said city." The taking was made under St. 1897, c. 426, as amended by St. 1899, c. 450. The later act went into effect on June 1, 1899. The work was begun on August 8, 1900, and was completed on January 22, 1901.

Under the direction of the presiding judge the jury made two findings, one in case the defendant could offset peculiar and special benefits, and the other in case it could not. If such benefits could be set off the jury in each case found that no compensation



was due. If such a benefit could not be set off, they found for the petitioners in the sums of \$972.96, and \$1,302.60, respectively. By the terms of the report, if the petitioners' contention as to the law was correct, judgment was to be entered for the petitioners for the above sums, respectively, with interest from May 3, 1904, the date of the jury's findings, to the date of judgment. If the defendant's contention was correct, judgment was to be entered for the defendant in both cases.

*E. F. McClennen*, (*H. F. Lyman* with him,) for the petitioners.

*S. H. Hudson*, for the respondent.

LORING, J. [After the foregoing statement of the case.] We are of opinion that the plaintiffs are entitled to judgment.

The only contention made by the defendant is based on St. 1902, c. 526, which provides that "The expense of the construction and maintenance of sewers in the city of Boston designed for the disposal of surface drainage solely shall be borne wholly by the said city." But under this taking the city had a right to use the channel for sewerage purposes. It follows that that defence fails.

The case presented therefore is one where a benefit assessment could have been made, but the city officials neglected to make one.

That a benefit assessment could have been laid under St. 1899, c. 450, see *Hall v. Street Commissioners*, 177 Mass. 434.

Where a benefit assessment might have been laid but none has been laid, there is no more reason for setting off the benefit than if it had been made. *Benton v. Brookline*, 151 Mass. 250.

In accordance with the terms of the report the entry must be

*Judgment for the plaintiff in the first case for \$972.96,  
and in the second case for \$1,302.60, with interest in  
each case from May 3, 1904, to the date of judgment.*



## COMMONWEALTH vs. F. SHIRLEY BOYD.

Suffolk. January 16, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, &amp; BRALEY, JJ.

*Constitutional Law. Automobile. Tax.*

St. 1903, c. 473, requiring the registration of automobiles, the payment of a registration fee of \$2, and the marking of the registered number in Arabic numerals not less than four inches long, is constitutional.

The \$2 required by St. 1903, c. 473, to be paid for the registration of an automobile is a license fee and not a tax.

LORING, J. This case is before us on exceptions taken at the trial in the Superior Court of a complaint originally made to the Municipal Court. At the trial in the Superior Court facts were agreed to which showed that the defendant was guilty. The complaint charges the defendant with having operated a duly registered automobile "without having then and there plainly displayed thereon, in Arabic numerals not less than four inches long, the registered number and mark of said automobile."

The defendant made six requests for rulings which take up two printed pages, but which were in effect that St. 1903, c. 473, is unconstitutional.

There can be no question of the right of the Legislature in the exercise of the police power to regulate the driving of automobiles and motor cycles on the public ways of the Commonwealth. They are capable of being driven and are apt to be driven at such a high rate of speed, and when not properly driven are so dangerous, as to make some regulation necessary for the safety of other persons on the public ways. In this connection see *Commonwealth v. Stodder*, 2 Cush. 562, 570.

Nothing in the act has been called to our attention which is not a proper exercise of this power. This act being passed by the General Court, it is not necessary to consider whether a somewhat similar act can be passed by a city, as to which see a decision in a county court of Illinois, *Chicago v. Banker*, 112 Ill. App. 94, the case that seems to have inspired the defendant's argument here.



The registration fee of \$2, required to be paid by § 1, is plainly a license fee and not a tax, as the fees were held to be which were imposed by the city ordinances in question in *Chicago v. Collins*, 175 Ill. 445; *St. Louis v. Grone*, 46 Mo. 574; and *Livingston v. Paducah*, 80 Ky. 656.

*Exceptions overruled.*

A. R. Shrigley, for the defendant.

F. H. Chase, Second Assistant District Attorney, for the Commonwealth.

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ALEXANDER S. PORTER vs. JAMES P. PRINCE & trustee.

Suffolk. January 17, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Practice, Civil, Service of writ. Writ, Service of. Error. Judgment, Vacation of.*

Under R. L. c. 167, § 84, the service of a writ at the last and usual place of abode of the defendant is not good in case the defendant is temporarily absent from the Commonwealth without the further notice required for absent defendants by R. L. c. 170.

A writ of error lies to vacate a judgment rendered on default after insufficient service on the defendant.

LORING, J. This is a writ of error to vacate a judgment rendered on default after service at the defendant's last and usual place of abode. In the assignment of errors it is alleged that the defendant in the original action was absent from the Commonwealth at the time of service of the writ, and continued to be absent therefrom until a time after the entry of judgment, and no further notice was given, as provided in R. L. c. 170.

The contention of the defendant in error is that where the defendant is a resident and is only temporarily absent from the Commonwealth, further notice need not be given.

His argument is that the provisions of § 84 of R. L. c. 167, are to be read and construed in connection with those of § 81; and so construed, § 84 applies only to non-residents.

But if the original act, of which R. L. c. 167, § 84 is the present re-enactment, is looked at, it is plain that that section is not



to be read in connection with § 81, and that it does include residents of the Commonwealth temporarily absent from it.

The original act, of which R. L. c. 167, § 34 is now the re-enactment, is Rev. Sts. c. 90, § 48, and originated in the report of the commissioners on the Revised Statutes. See c. 90, § 48. The original act of which R. L. c. 167, § 31 is the re-enactment originated in Prov. St. 1700-1, c. 20, § 1; 1 Prov. Laws, (State ed.) 447.

The provision of Rev. Sts. c. 90, § 48, (now after successive re-enactments contained in substance in R. L. c. 167, § 34,) is: "In all cases, when the defendant is out of the State at the time of the service of the summons, he shall, in addition to the service thereof, as herein prescribed, be entitled to further notice of the suit, as provided in the ninety-second chapter." The occasion of this section seems to have been to make certain of the point now urged by the defendant in error.

In addition to this there are two cases where a judgment has been held bad against a resident temporarily absent from the Commonwealth. *Johnson v. Thaxter*, 12 Gray, 198. *Smith v. Paige*, 4 Allen, 94.

*Judgment vacated.*

*W. C. Cogswell*, for the plaintiff in error.

*J. P. Prince*, pro se.

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ANSEL J. CHENEY vs. CITY OF BEVERLY & others.

Essex. January 27, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

*Tax, Assessments for benefits. Sewer. Certiorari. Constitutional Law. Statute, Construction.*

If, when a town has adopted a system of sewerage under Pub. Sts. c. 50, § 7, providing for assessments for benefits under § 4 of that chapter, the assessments should be made by the selectmen instead of by the town itself, which here was not decided, this court will not grant a writ of certiorari to quash an assessment because made by the town, especially where the petition is filed more than nine years after the assessment was made.



Pub. Sts. c. 50, § 7, (R. L. c. 49, § 5,) providing for sewer assessments and contemplating that they should be proportional, should be read as if it contained the words "but in no case shall an assessment be made that exceeds the special benefit received by the estate assessed," and so construed is constitutional.

PETITION, filed October 20, 1902, and amended May 12, 1903, for a writ of certiorari to quash the proceedings of the mayor and aldermen of the city of Beverly in laying a sewer assessment on certain real estate of the petitioner on Arthur Street in that city.

The case came on to be heard by *Barker, J.*, who reserved it upon the amended petition, the return of the respondents and an agreed statement of facts for determination by the full court.

*D. N. Crowley*, for the petitioner.

*H. H. Darling & A. Boyden*, for the respondents.

KNOWLTON, C. J. This is a petition for a writ of certiorari to quash an assessment of a part of the cost of construction of a sewer, upon the estates benefited thereby.

The sewer was constructed as a part of a system of sewers adopted by the town of Beverly by a vote of the inhabitants on March 6, 1893, in accordance with the provisions of the Pub. Sts. c. 50, § 7. This appears not only by the votes of the town, and subsequently by those of the board of aldermen of the city, but by the averment of the petition "that said sewer was constructed as a part of the system of sewerage alleged to have been adopted by the town of Beverly." The adoption of this system is attacked. It is contended, first, that it was adopted without an estimate of the cost of the sewers to be included in it. But it appears by the answer of the respondents and by the statement of agreed facts that an estimate in writing of this cost, made by one Bowditch, an eminent engineer, a copy of which is annexed to the answer, was submitted to the town and was in the custody of the town clerk for the use of the town. It is also agreed that the plans referred to in this report constitute the system of sewerage mentioned in the vote of the town, and that the requisite levels, distances, directions and locations are shown with sufficient fulness upon these plans. It appears that the recommendations of the committee's report in regard to the assessment for the construction of this system of sewerage, which were adopted by the town, were founded upon this estimate of cost made by Mr. Bowditch. In all these particulars, therefore, the adoption



of the system and the provision in regard to assessments meet the requirements of the Pub. Sts. c. 50, § 7.

The St. 1892, c. 245, was in force before the system was adopted, and it is contended that there was no determination that the town should pay a part of the expense of the sewers, as required by § 9 of that chapter (R. L. c. 49, § 27). It is said in the report which was adopted by the town that "the portion of expense to be borne by the town, when the whole system is complete, is estimated to be one-third of the total expense of construction." The assessment then voted to be laid upon the estates of abutters for all sewers constructed as a part of the system, and the ordinance of the city subsequently passed in accordance with this vote, follow this estimate. It seems, therefore, that from the beginning the town and city have been paying for all sewers constructed, including that for which the petitioner's property is assessed, at the rate of one third of the total estimated cost, considering it on the basis of the cost of the whole system. It does not appear that the part to be paid by the town was determined by the selectmen, as the statute directs, but the part is not less than one fourth nor more than two thirds, as the statute prescribes, and it was determined by the town itself, when establishing a system of sewerage and providing for assessments. If the statute contemplates action by the selectmen instead of the town when provision for assessments is made under the Pub. Sts. c. 50, § 7, which we do not decide, we are of opinion that the adoption of the system and the provision for the assessment in this case should not be set aside for such an irregularity, which cannot be presumed to have changed the results. Besides, the length of time that has elapsed since the system was adopted is a sufficient reason for refusing to interfere by a writ of certiorari for such a cause.

The objection that the assessment is not made in reference to the cost of the particular sewer to which it relates is without foundation, for by the terms of the statute, it may be a fixed, uniform rate, based upon the average cost of all the sewers in the system, and this must be a matter of estimation.

Although the constitutionality of the statute has not been argued at length, the petitioner says that the assessment is illegal because it is made without regard to the cost or benefit, and he



cites decisions which hold that a statute which shows on its face an entire disregard of the relation of the benefits to the taxes to be assessed upon the respective estates is unconstitutional. *White v. Gove*, 183 Mass. 333, 336. *Weed v. Boston*, 172 Mass. 28. *Dexter v. Boston*, 176 Mass. 247. A decision sustaining the validity of the assessment necessarily involves the constitutionality of the statute.

The statute authorizes an assessment at "a fixed uniform rate, . . . according to the frontage of such estates on any street or way where a sewer is constructed, or according to the area of such estates within a fixed depth from such street or way, or according to both such frontage and area," etc. Pub. Sts. c. 50, § 7, (R. L. c. 49, § 5.) Then follows a provision that no assessment shall be made in respect to any estate which, by reason of its grade or level, or for any other cause, cannot be drained into the sewer, until such incapacity is removed. In view of the decisions that have been made in this court, in the Supreme Court of the United States, and in many other courts, there is no doubt that an assessment of this kind, founded upon such benefits, should be made proportional to such benefits, and in no case should exceed them. There is often difficulty in establishing a mode of assessment that is reasonable, convenient and practicable, which will not work injustice in its application to individual cases. The best that can be done is to reach a reasonable approximation to accuracy in the disposition of such public burdens, and much must be left to the judgment of the Legislature which determines methods. The language just quoted shows a determination of the Legislature that, in ordinary cases, except under peculiar conditions, an assessment according to the frontage upon the street, or according to the area within a fixed depth from the street, is approximately proportional and equal, according to the benefit received. A statute authorizing an assessment upon a similar basis was upheld in *Sears v. Aldermen of Boston*, 173 Mass. 71. See *White v. Gove*, 183 Mass. 333, 336. But this decision was put upon the ground that the statute contemplates a division of the city into parts, so as not to make such an assessment in places where there is no special benefit to the abutters. In *Smith v. Mayor & Aldermen of Worcester*, 182 Mass. 232, the court said of an early



statute affecting a part of the city of Worcester, "If it were necessary in order to sustain the constitutionality of the statute, we should read the words 'shall pay such sum as the mayor and aldermen shall assess upon him as his proportionate share of the expenditure' etc. as meaning a share not in excess of the special and peculiar benefit which his estate is adjudged to receive," etc. In *Hall v. Street Commissioners*, 177 Mass. 484, it was held that the word "proportional" in a provision for an assessment means "proportional to the special benefit received," and on this ground the statute was held constitutional. We are of opinion that the Pub. Sts. c. 50, § 7, (R. L. c. 49, § 5,) taken in connection with other parts of the statute, shows an intention that the assessment shall be proportional, and while it determines that the specified methods may be adopted as giving assessments which are proportional under the usual conditions, it was not intended to authorize an assessment of an amount which exceeds the special benefit. We are of opinion that the statute should be construed as if it contained the words, "but in no case shall an assessment be made that exceeds the special benefit received by the estate assessed." So construed it is in conformity with the Constitution of the Commonwealth and the Constitution of the United States.

*Petition dismissed.*

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MARY A. HARRIS, administratrix, vs. PUTNAM MACHINE  
COMPANY.

Worcester. February 28, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Negligence, Employer's liability.*

In an action against a machine company for causing the suffering and death of the plaintiff's intestate and husband, who was the foreman of the defendant's foundry and an experienced moulder but not a machinist, by the contents of a ladle of molten iron being spilled upon him from the simultaneous breaking of two bolts securing an iron yoke which held the top of a crane to which the ladle was attached against a timber extending across the foundry, if it appears that the bolts had been in use for fifteen years during which they at times had been loose and subjected more or less to shock, and that both of them were crystal-



lized, it is a question of fact for the jury whether the failure to subject the bolts to some kind of examination or to replace them by new ones was negligence on the part of the defendant.

TORT, under R. L. c. 106, § 72, with a count at common law, for causing the conscious suffering and death of the plaintiff's intestate by the spilling upon him of the contents of a ladle of molten iron upon the simultaneous breaking of two bolts holding a yoke supporting a crane to the end of which the ladle was attached. Writ dated January 13, 1903.

At the trial in the Superior Court before *Lawton, J.*, it appeared that the plaintiff was the widow of the intestate, that the accident occurred at about five o'clock in the afternoon of October 9, 1902, and that the intestate after about twelve hours of conscious suffering died on the following day, that the intestate was foreman of the defendant's foundry and had acted in that capacity for seven years, and for several years before that time had been a moulder in the defendant's foundry, that he was fifty-two years old and had been a moulder about twenty-six years continuously, that he had never been a machinist, that the cause of the accident was the giving way of a fixed crane or derrick of the defendant used in the foundry, from the breaking of two bolts which secured an iron yoke to the side of the timber which extended across the foundry. The yoke held the top of the crane against the timber. There was evidence that before certain repairs were made the bolts had been loose in the timber so that the yoke slipped on the side of the timber, and an expert for the plaintiff testified that in his opinion the looseness might have begun after the first six months of its use, and gave as the reason for his opinion the shrinking of the timber owing to the excessive heat in the foundry. It appeared that the foundry was built in 1887, and that the bolts had been there ever since that time. When the crane or derrick fell, by reason of the breaking of the bolts, a ladle of molten iron containing from four to five tons was suspended from the end of the crane. The plaintiff's intestate was on one side of this ladle when the bolts gave way, and the ladle fell, tipped over and spilled its contents upon the intestate. The plaintiff testified, against the objection of the defendant, that the president of the defendant interviewed her after the funeral, and said that the derrick broke



and a ladle fell and tipped on something that threw the hot iron upon the intestate's back, and said that the bolts were both crystallized.

At the close of the evidence the judge ruled that upon all the evidence the plaintiff was not entitled to recover, and ordered the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

*C. E. Tupper*, for the plaintiff.

*C. F. Baker & W. P. Hall*, for the defendant.

HAMMOND, J. The plaintiff's intestate was an experienced moulder, and at the time of the accident was foreman of the foundry, directing the beds where the moulding was to be done, and having the general charge of the foundry work; but he was not a machinist; and, while he was expected to give notice to the superintendent if he saw any evidence of a defect or want of repair in a crane or a derrick, he had nothing to do with the repairs. The responsibility for the repairs did not rest upon him but on his superior officer.

The weight of the pot of molten iron which was upon the crane at the time of the accident was no heavier than usual; and it does not appear that the crane was subjected to any strain which might not reasonably have been anticipated. It might therefore be inferred that the bolts were not strong enough to hold up the crane under the conditions reasonably to be expected in the ordinary work, and therefore that the apparatus was defective.

The duty owed by the defendant to the intestate was that of using due care to see that the apparatus was in proper condition. It was an important duty. Plainly, if the crane should give way and spill a large mass of molten iron, the lives of the workmen might be in peril. It would serve no useful purpose to recite in detail the evidence. It is sufficient to say that in view of the number of years during which these bolts had been in use, the number of times the yoke had been loose and the bolts subjected to shock, the consequent liability of the iron to crystallization and a resultant weakening, and the great danger to life and limb of the workmen by possible breaking of the bolts, the question whether the failure either to subject the bolts to some kind of examination or to replace them by new ones so



that the necessary strength of the apparatus should be maintained was negligence on the part of the defendant, was a question of fact for the jury.

*Exceptions sustained.*

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NEW ENGLAND HOSPITAL FOR WOMEN AND CHILDREN *vs.*  
STREET COMMISSIONERS OF THE CITY OF BOSTON.

WILLIAM A. GASTON & another *vs.* SAME.

ROBERT H. GARDINER *vs.* SAME.

GEORGE B. WILBUR *vs.* SAME.

Suffolk. March 7, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Constitutional Law. Tax, Assessments for benefits. Boston. Way, Laying out of highway.*

St. 1902, c. 527, authorizing the assessment of betterments for certain improvements in the city of Boston completed by that city within six years before the day of the passage of the act, authorizes only one assessment for each improvement within its terms, and is not invalid as purporting to authorize two assessments for the same improvement.

Under St. 1892, c. 418, § 5, in regard to the laying out of highways in Boston the street commissioners of that city can make an order for the extension and widening of a street and later make a separate order for its construction. This was done by them in extending and widening Columbus Avenue under St. 1894, c. 416. *Held*, that the improvement was not completed until the work of construction was finished and the street was ready for use by the public, and this completion of the street having been within six years before the passage of St. 1902, c. 527, betterments could be assessed for the improvement under the terms of that act although the order for the extension and widening was passed more than six years before the passage of the act.

An owner of real estate on which betterments have been assessed for the extension and widening of a highway cannot complain because the street commissioners in making the assessment left out of consideration a part of the cost of the improvement if the cost which they considered was more than enough to justify the assessment.

FOUR PETITIONS, filed July 15, 1903, by owners of real estate on Columbus Avenue in Boston, for a writ of certiorari addressed to the street commissioners of that city to quash their proceedings assessing betterments upon the respective estates of the



petitioners for the extension and widening of that avenue, as stated in the first paragraph of the opinion.

The first three cases came on to be heard before *Barker, J.*, who at the request of the parties reserved them for determination by the full court on the petition, the return and further returns of the respondents and the following facts and stipulations: That on September 4, 1895, the superintendent of streets first entered upon the location for the purpose of beginning the construction of sewers, and on January 7, 1896, entered on the part of the location nearest Northampton Street for the purpose of beginning the construction of the avenue. The fourth case came on to be heard before *Lathrop, J.*, who reserved it for determination by the full court on the same terms as the other three cases.

*C. Warren*, (*J. Codman* with him,) for the New England Hospital for Women and Children.

*R. M. Saltonstall*, for Gaston and another.

*F. R. Bangs*, for Gardiner.

*H. D. McLellan*, for Wilbur.

*T. M. Babson*, for the respondents.

KNOWLTON, C. J. These are petitions for writs of certiorari to quash assessments of betterments upon the estates of the several petitioners for a part of the cost of widening and extending Columbus Avenue in the city of Boston. The assessments were made under the St. 1902, c. 527, which was considered in *Warren v. Street Commissioners*, 187 Mass. 290.

The principal contention in the present cases is that the statute purports to authorize two assessments for the same public improvement, one for the legal act which determines that certain changes are to be made, and another for the benefits coming from the changes when they have been completed by the construction, and that therefore it is invalid. This contention is founded upon an erroneous view of the statute. The act does not purport to authorize two assessments for the same public improvement. It authorizes an assessment only for a "public improvement completed by the city within six years" before the day of the passage of the act. For a public improvement so completed, there can be but one assessment. *Warren v. Street Commissioners*, *ubi supra*. The improvement for which the assessments were laid in these cases was made under the St. 1894,



c. 416, § 1, which authorized the street commissioners of Boston by order to "extend, widen and construct . . . Columbus Avenue in said city from Northampton street, through or over any existing streets or ways or private land, to or near Franklin Park in said city, or any part of said distance," or to do any one or more of said acts. Section 2 of this chapter requires that "Said board shall, after any such order of said board . . . has been carried out, determine the cost incurred in carrying out such order," etc., with a view to assess a part of the cost upon estates benefited by the improvement. The order for the extension and widening was passed on January 4, 1895. The order of notice of the contemplated proceedings, issued before the meeting at which this order was passed, expressly stated that the board was of opinion that public necessity and convenience required "that said avenue, so extended and widened be constructed," and that they intended to take the action so required. Under the St. 1892, c. 418, § 5, the board was not required to include an order for construction in the order determining that a public improvement should be made, but might make a separate order for construction. In this case, after the order for the extension and widening, a separate order for construction was passed on August 13, 1895. But both of these orders related to the same public improvement, and the improvement was not completed until the work of construction was done. The commissioners say, in the order of assessment, that the public improvement was completed on April 20, 1899, which was the time when the work of construction was finished.

The contention of the several petitioners that the public improvement was completed at the time of making the original order for widening and extension is, therefore, erroneous, and the improvement was completed within six years before the day of the passage of the St. 1902, c. 527, and could, therefore, be made a subject for assessment under the act.

Ordinarily such a public improvement as the laying out, or widening, or extension of a street is not completed, within the meaning of this statute, until it is put in condition for public use. The ambiguity in the statute arises from the fact that, under the laws applicable to the city of Boston, it recognizes the possibility of a public improvement of some one of the kinds mentioned, which may be completed without construction, and the possibility



of such a condition that construction itself may be an independent public improvement. It provides for assessment on account of such public improvements if there are any. Certainly such improvements are very unusual. Plainly the improvement in the cases now before us was not completed until the street was constructed, ready for use by the public. See *Chase v. Aldermen of Springfield*, 119 Mass. 556, 563; *Prince v. Boston*, 111 Mass. 226, 231; *Lincoln v. Worcester*, 122 Mass. 119; *Foster v. Park Commissioners*, 133 Mass. 321, 327; *Atkinson v. Newton*, 169 Mass. 240; *Jones v. Metropolitan Park Commissioners*, 181 Mass. 494. It was, therefore, within the provisions of the statute under which the assessments were made.

The petitioners cannot complain because the street commissioners, in making the assessments, left out of consideration a part of the cost of completing the improvement. The cost which they considered was much more than enough to justify the assessment. If they had included all the cost, the result would have been the same.

*Petitions dismissed.*

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### COMMONWEALTH vs. FRANK BOND.

Suffolk. March 30, 1905. — May 17, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Forgery. Practice, Criminal, Exceptions. Lord's Day. Pleading, Criminal, Variance. Evidence, Admissions by conduct.*

To sustain an indictment under R. L. c. 209, § 3, for uttering a forged check knowing it to be forged, if it appears that the defendant knew that the check was false and asserted its genuineness for the purpose of getting money, it is not necessary to show that the check was made by the defendant or that the person whom the defendant sought to deceive was in fact misled.

On the trial of an indictment for uttering a forged check knowing it to be forged, if the bill of exceptions does not show any evidence or offer of proof that the check was dated on the Lord's day, the defendant, on the argument of an exception to a refusal of the trial judge to rule that he should be acquitted, cannot by resorting for the first time to the calendar show that the check bore date on the Lord's day and therefore was void.

On the trial of an indictment under R. L. c. 209, § 3, for uttering a forged check knowing it to be forged, if the check when put in evidence bears the indorsement of the alleged payee which is not alleged in the indictment, this is not a



material variance, as the indorsement constitutes no part of the crime with which the defendant is charged and need not be alleged or proved.

On the trial of an indictment for uttering a forged check knowing it to be forged, evidence of the conduct and statements of the defendant is admissible to show his knowledge of the falsity of the check and his evil intention in passing it. For this purpose the testimony of the officer who arrested him as to the defendant's conduct and declarations immediately after he supposed that he had obtained the money on the false check is admissible.

INDICTMENT, found and returned in the Superior Court for the county of Suffolk on February 11, 1905, under R. L. c. 209, §§ 1, 3, in two counts, the first for making and forging a certain check for \$45, and the second for uttering the same check knowing it to be forged.

At the trial in the Superior Court before *DeCourcy, J.*, the judge, against the defendant's objection, admitted certain testimony of the officer who arrested the defendant which is referred to in the opinion, and refused to rule that on all the evidence the defendant should be acquitted on both counts of the indictment. He ordered the jury to return a verdict of not guilty on the first count, and submitted the case to the jury on the second count. The jury returned a verdict of not guilty on the first count and guilty on the second count. The defendant alleged exceptions, raising the questions stated by the court.

*P. J. Casey*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth.

BRALEY, J. To constitute the offence charged in the second count of the indictment it was unnecessary to allege and prove that the false check was made by the defendant, or that in his effort to obtain money by passing it he was successful. It is the guilty purpose to defraud by the use of an apparently valid instrument, that is known to the utterer to be forged, which the statute makes punishable, and hence it is not required that the person whom it was sought to deceive should in fact have been misled. *Commonwealth v. Ladd*, 15 Mass. 526. R. L. c. 209, §§ 1, 3.

If the defendant knew at the time that the check was false, and by his statements, or acts, asserted its genuineness for the purpose of getting money, he would be guilty of uttering the forged order. *Regina v. Ion*, 6 Cox C. C. 1.



Under his general exception to the refusal of the judge to rule that upon all the evidence he should be acquitted, the argument of the defendant that as the check bore date on the Lord's day it was void, and because no civil liability would have arisen if it had been genuine, he ought not to have been convicted, may be dismissed without a full discussion.

This fact, like all facts on which a defendant relies in support of his defence, if not admitted, must be shown by competent evidence at the trial, and as the exceptions do not disclose that such proof was offered, we cannot for the first time by resort to the calendar supply the deficiency. *Hill v. Dunham*, 7 Gray, 543.

He further contends that while the check introduced in evidence bore the indorsement of the alleged payee, there was no corresponding allegation in the indictment of this indorsement, and by reason of this omission there was a variance. But as the check, with the uttering of which the defendant is charged, and not the indorsement, is the forgery, there was no occasion for making allegations that were not required to be proved to complete the offence. *Commonwealth v. Ward*, 2 Mass. 397. *Commonwealth v. Welch*, 148 Mass. 296, 298. *People v. Caton*, 25 Mich. 388. R. L. c. 209, §§ 1, 3.

No attempt was made on the part of the defendant to controvert the testimony introduced by the government, and upon the issue raised there were three questions of fact to be determined: the falsity of the check; the defendant's knowledge of its falsity; and his evil intention in passing it. And if there was any evidence to support them, the ruling requested was rightly denied.

When seeking to deceive and defraud others, and to persuade them to advance money by the acceptance as genuine of a forged instrument, the wrongdoer is not likely to make known his object by verbal declarations. The character of the transaction generally must be ascertained from his conduct. For this purpose the testimony of the officer who arrested him, and observed his acts immediately after the defendant supposed that he had obtained the money, and who also testified to declarations then made by him, was competent. *Commonwealth v. Devaney*, 182 Mass. 33, 36. *Sumner v. Gardiner*, 184 Mass. 433.

At first the defendant represented himself as acting for another in the negotiation of the check, and gave the street and



number where his principal could be found. But when he ascertained, after passing it, that instead of getting the money as he expected in the envelope which was handed to him, he had received only pieces of blank paper, he threw these away, and denied to the arresting officer all knowledge of the envelope, though it could have been found that at the time it was in his possession. Upon the suggestion that the officer would go to the place where the defendant had stated his principal was to be found, he then denied having made such a statement, and said that he met the man who gave him the check on the street. It further appeared that the books of the bank on which the check was drawn did not contain the name of any depositor by the name of the drawer, or any account from which it could be paid. There also was some evidence from which it might be inferred that he was assisted by confederates who attempted to aid him in making his escape after, as they believed, the money had been received.

From the inferences that might be legitimately drawn from all that he did, his behavior when viewed in the light most favorable to him, at least was equivocal, and taken in connection with the worthless check, that came from his possession, it was for the jury to determine under appropriate instructions, which were given, what conclusion should be drawn therefrom as to his innocence or guilt. *Commonwealth v. Talbot*, 2 Allen, 161. *People v. Clements*, 26 N. Y. 193, 196, 198.

*Exceptions overruled.*

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JOHN JAQUES AND SON *vs.* PARKER BROTHERS.

Essex. November 11, 1904. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Contract, Construction, Performance and breach, Waiver.*

In an action for the price of one thousand gross of ping pong balls shipped by the plaintiff to the defendant under an alleged contract for the sale and shipment of a much larger number of like ping pong balls, of which all the others had been delivered and paid for, it was *held*, that the correspondence described in the opinion warranted a finding by the judge who heard the case, without a jury, upon



an agreed statement of facts with the power to draw inferences, either that the defendant, there being no dispute as to the price, absolutely had undertaken to receive and pay for nine hundred thousand balls not to be delivered before November 20 of the year when the contract was made, subject to an agreement on the part of the plaintiff to turn them out more quickly if it could do so, and that the defendant was bound to receive and pay for the thousand gross in controversy, or that, if there was an agreement on the part of the plaintiff that shipments should be made at the rate of two thousand gross per month and that they should be completed by October 20, those requirements were waived by the defendant.

MORTON, J. This is an action of contract to recover for the price of one thousand gross of match ping pong balls, the last of six thousand two hundred and fifty gross, all the rest of which have been shipped by the plaintiff to and have been received and paid for by the defendant. The plaintiff is a corporation organized under the laws of Great Britain and the defendant is a corporation organized under the laws of the State of Maine. The case was heard upon agreed facts by a judge of the Superior Court without a jury and with the power to draw all proper inferences of fact. The judge found for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain rulings asked for by it.

The question at issue relates to the terms of the contract between the plaintiff and the defendant. The defendant contends in substance that the balls were to be shipped by the plaintiff at the rate of two thousand gross per month, that the last shipment was to be made by October 20, 1902, and that the plaintiff did not make the shipments at the rate or time agreed and in consequence thereof the defendant refused, as it had the right to do, to receive the last shipment, the price of which is sued for. The plaintiff denies that it agreed to ship the balls at the rate of two thousand gross a month, or to complete the shipments by October 20, 1902, and it contends that it has done all that it agreed to do, and further alleges that, if there was any agreement on its part to make the shipments at the rate and to complete them by the time named, those provisions were waived by the defendant.

The contract is found in a long series of letters and cablegrams between the parties which are set out in the agreed facts and which begin with a letter of inquiry from the defendant dated April 24, 1902, to which the plaintiff replied, and end with a



letter also from the defendant dated March 10, 1903. The later part of the correspondence is in relation to the controversy which then had arisen. On June 10 the defendant wrote asking the plaintiff to cable price for one thousand gross "match ping pong balls, best quality, and of the cream shade" and saying that it should want them in shipments of about three hundred gross per month. To this the plaintiff cabled a reply naming price "subject to immediate reply by wire," and on the next day the defendant cabled "Enter order one thousand gross. Ship part", and followed this with a letter two days later confirming the order thus sent. No question arises as to this order, or the contract thus made. Less than a week later, June 26, the defendant cabled the plaintiff as follows: "Negotiating one million best balls. Cable special proposition million best quality match," and on June 30 the plaintiff replied by cable "will accept immediate order 7/3 [meaning seven shillings three pence per gross] less 2 1-2 % delivery to be completed about end of the year." Some cablegrams followed in regard to the price, the plaintiff declining to make a lower price but nothing further being said about the time of delivery, and on July 8 the defendant cabled plaintiff, "Increase order to four thousand gross 7/3," and on July 11, "Increase our order to five thousand less the customary discount. Ship part at once, remainder to follow." On July 12 the plaintiff cabled that it could discount 7/3 if the order was increased to nine hundred thousand. This cablegram was sent in the code and an error was made by the cable company in the transmission, the word "inansion" being transmitted "fanition." "Inansion" means "increase order." To this on the fifteenth the defendant replied by cable "Cannot translate the word 'fanition.' Otherwise accepted." Upon receipt of this cablegram the plaintiff caused its message to be repeated correctly, though the mistake does not appear to have substantially affected the defendant's understanding of it. So far the result would seem to have been an arrangement between the parties that the plaintiff should furnish and the defendant take nine hundred thousand balls at 7/3 per gross less customary discount of two and one half per cent, part to be shipped at once and the remainder to follow and the shipments to be completed by the end of the year. In the meantime the defendant had written to the plaintiff on July 7



confirming the order for four thousand gross, and directing the shipments to be made at the rate of one thousand gross a month and to be completed before October 10. On July 15 the plaintiff wrote to the defendant reciting the various cablegrams and explaining the mistake in that of the same date in regard to the use of the word "fanition," and expressing the hope of hearing from the defendant in full confirmation of the order. On July 17 the plaintiff wrote acknowledging the receipt of the defendant's letter of July 7 and saying "With regard to the deliveries we cannot give you a definite date as early as that mentioned in your order, but we hope to have the entire order delivered by November 20, and if we find that we can turn them out quicker we will do so." On the same day the defendant wrote to the plaintiff confirming the increase of its order to nine hundred thousand balls and directing that they should be shipped at the rate of two thousand gross per month. This letter was acknowledged by the plaintiff in one from it to the defendant bearing date July 28 in which it says, speaking of the matter of deliveries, "Your Mr. Richardson and our previous letters will have informed you as to deliveries, but we feel sure we shall be able to keep you supplied." It is agreed that this reference to Mr. Richardson is immaterial to the matter in controversy. No further correspondence seems to have passed between the parties in reference to the time when the deliveries were to be made unless a request by the defendant in a letter of August 8 to the plaintiff to be advised on receipt of it how promptly the plaintiff would make shipments and whether it would be sure to put two thousand gross on the steamer in August and on what dates it would ship, and the plaintiff's reply dated August 18 in which it gave the shipments that had been made and would be made in August, making eighteen hundred gross in all, and added that its new plant would come into operation next month when it would "not only pick up the quantity required, but send you at least two thousand gross during September, and your order will be completed by the end of October" can be so regarded. Subsequently on August 29 the defendant wrote the plaintiff to delay its next shipment to September 20 and on September 2 cabled the plaintiff to make the next shipment October 1, that is, to delay still further. The plaintiff however objected to delay



and thereupon the defendant wrote to the plaintiff that it might make shipments of five hundred or a thousand gross at a time, and on September 17 the plaintiff shipped six hundred gross and on September 30 one thousand gross, which were promptly paid for by the defendant. The plaintiff also shipped on October 13 six hundred gross and on October 24 one thousand gross which likewise were paid for promptly by the defendant. On October 24 the defendant wrote requesting the plaintiff to ship the balance of the order in two shipments immediately after the first of the year and on the next day cabled the plaintiff to cease all shipments. The plaintiff had the balance of the goods, one thousand gross, ready for shipment and after some correspondence shipped them to the defendant on November 21 and the defendant declined to receive them. Thereupon after some further correspondence this action was brought.

We think it is plain from this review of what passed between the parties that the judge would have been justified in finding, and, for aught that appears, did find either, that the defendant, there being no dispute as to the price, had absolutely undertaken to receive and pay for nine hundred thousand balls not to be delivered before November 20, subject to the plaintiff's agreement to turn them out more quickly if it could do so, and that the defendant was bound to receive and pay for the thousand gross in controversy, or that, if there was an agreement on the plaintiff's part that shipments should be made at the rate of two thousand gross per month, and that they should be completed by October 20, those requirements were waived by the defendant. In either view the finding of the judge in favor of the plaintiff would be well warranted. This view of the case renders it unnecessary, we think, to consider *seriatim* the various rulings that were requested by the defendant and refused, though we may say that we discover no error in the way in which the judge dealt with them.

*Exceptions overruled.*

*F. H. Noyes*, for the defendant.

*B. G. Davis*, for the plaintiff.



## CHARLES M. WHITE vs. EDWARD A. ABBOTT.

Suffolk. November 17, 1904. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LOKING, & BRALEY, JJ.*Contract, Building contracts. Architect. Arbitrament and Award.*

If a contract for the mason work of a building, between a subcontractor, called in the contract "the contractor," and the principal contractor for the construction of the building, called in the contract "the owner," provides that if the architect shall certify that the contractor has refused, neglected or failed to perform the work called for by the contract the owner may terminate the employment of the contractor and enter the premises and complete the work, and that in such case the contractor shall not be entitled to receive any further payment under the contract until the work shall be wholly finished, at which time if the unpaid balance to be paid under the contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner, and that expenses "either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties," and if the subcontractor ceases to furnish labor and materials upon the building and the principal contractor, called the owner, by direction of the architect enters upon the premises and completes the work to the satisfaction of the architect, and the architect makes a certificate that he has audited and certified the expense, and includes therein a sum of \$5,000 claimed as a commission by the principal contractor for his services in making the arrangements and supervising the work, this as matter of law is an expense within the meaning of the contract and the architect's certificate upon it is conclusive.

CONTRACT upon a contract in writing, described in the opinion, where the only material article, the fifth, is quoted. Writ in the Municipal Court of the City of Boston dated September 18, 1902.

On appeal to the Superior Court the case was heard by *Mason*, C. J., without a jury, upon an auditor's report and oral evidence. The judge refused to make certain rulings requested by the plaintiff and found and ruled as follows:

"The court finds that the architect and the defendant acted in good faith without fraud, in all that pertained to the presentation of the defendant's claim, auditing and certifying the same.



"That of the items allowed the defendant by the architect the following were not for expense incurred by the defendant for material and labor furnished for completing the contract: [four items] making in all \$2,705.38.

"What the architect was authorized to audit, and upon which his certificate is conclusive upon the parties under Article 5, is the expense incurred by the defendant for materials or labor in completing the contract, and any damage sustained by the defendant through the plaintiff's default. The architect derived no authority from this article to audit or certify expense incurred for any other purpose. The provision does not oust the jurisdiction of the court to determine what expense incurred by the defendant was for the purpose named. As to all expense incurred for the purpose of completing the contract, the decision of the architect, acting in good faith, without fraud on his part or on the part of the defendant, and his certificate thereof are conclusive, and not subject to revision by the court."

The judge found for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in November, 1904, before *Knowlton, C. J., Morton, Lathrop, Barker, & Loring, JJ.*, and afterward was submitted on briefs to all the justices.

*W. Mooers & F. H. Stewart*, (*W. J. Desmond* with them,) for the plaintiff.

*J. K. Berry*, (*E. C. Upton* with him,) for the defendant.

KNOWLTON, C. J. The defendant was the original contractor for the construction of a large building, and in the subcontract hereafter described is called "the owner." W. L. Clark and Company, as subcontractors, agreed with him to do the mason work for the sum of \$73,000, under the direction and superintendence of one Safford as architect. The fifth article of this subcontract is as follows: "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after two days' written notice to the contractor, to provide any such labor or materials,



and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract ; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor ; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties." The plaintiff sues as assignee of this subcontract, to recover the balance due thereon.

On April 5, 1901, Clark and Company ceased to furnish labor and materials upon the building, and the defendant, by the direction of the architect, entered upon the premises to complete the work. This was done to the satisfaction of the architect, about September 1, 1901. On January 10, 1902, the architect made a certificate, under the fifth clause of the contract, that he had audited and certified the expense incurred by "the owner" in completing the contract. According to this certificate, this expense of completion exceeded the unpaid balance by \$4,411.14. One item of expense included in the certificate was \$5,300, claimed as a commission and allowed to the defendant for his services in making the arrangements and supervising the work. The principal question is whether this item should be reduced, or stricken out, or allowed to stand.

The validity of the provision contained in Article 5, authoriz-



ing the architect to certify the amount of expense incurred by the owner, has not been questioned in the argument before us, and we are of opinion that it is not like those agreements which cannot be enforced because they purport to oust the courts of jurisdiction by submitting the determination of all rights under the contract to an arbitrator, but is one of a different class. *Audette v. L'Union St. Joseph*, 178 Mass. 113. *Flint v. Gibson*, 106 Mass. 391. *Palmer v. Clark*, 106 Mass. 373. *Robbins v. Clark*, 129 Mass. 145. *White v. Middlesex Railroad*, 135 Mass. 216, 220. *Mittenthal v. Mascagni*, 183 Mass. 19, 23. *New England Trust Co. v. Abbott*, 162 Mass. 148, 154. *Norcross v. Wyman*, 187 Mass. 25. A certificate made under such a contract, in the absence of fraud, or of such palpable mistake as prevents the arbitrator from the exercise of his judgment upon the matters submitted to him, is binding upon the parties. See cases above cited. Also, *Martinsburg & Potomac Railroad v. March*, 114 U. S. 549; *Sharpe v. San Paulo Railway*, L. R. 8 Ch. 597, 607; *Korf v. Lull*, 70 Ill. 420; *Dingley v. Greene*, 54 Cal. 333. In the present case, both the auditor and the judge before whom the case was tried in the Superior Court, have found that the "architect and the defendant acted in good faith without fraud, in all that pertained to the presentation of the defendant's claim, auditing and certifying the same." The judge also ruled that "as to all expense incurred for the purpose of completing the contract, the decision of the architect, acting in good faith, without fraud on his part or on the part of the defendant, and his certificate thereof are conclusive, and not subject to revision by the court."

The plaintiff contends that the allowance for services was not expense within the meaning of the contract, and that therefore the architect could not certify it. Of course he could not create for himself jurisdiction, and he had no authority to allow as expense a claim which was outside the class which he was appointed to consider. Claims were within his jurisdiction for examination if they were of the class intended to be submitted to him, upon which his certificate was to be conclusive. We are of opinion that within the class designated, which fairly may be called claims for expense under the contract, he could make a certificate that would be conclusive. We are of opinion that



the defendant's claim of a compensation for services belonged to the class of claims for expenses to be passed upon by him. We therefore hold, as matter of law, that it was within his jurisdiction, to be allowed or disallowed, in whole or in part, under his appointment. We do not pass upon the question whether the sum of \$5,300 allowed by the architect was more than properly should be allowed for overseeing the work, because the architect's conclusion upon the amount is final.

Because it was within the class of claims which he was authorized to audit and certify, his certificate is conclusive and this court has no power to disregard it. Other claims, which were disallowed by the Superior Court as not within his authority to audit and certify, we have no occasion to consider.

*Exceptions overruled.*

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### WASHINGTON NATIONAL BANK vs. SAMUEL WILLIAMS.

Suffolk. January 11, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Execution. Waiver. Poor Debtor. Contract, Construction.*

In this Commonwealth it can be shown and determined in a collateral action that an execution was void because issued contrary to law.

The provision of Pub. Sts. c. 171, § 15, that no execution shall be issued within twenty-four hours after the entry of judgment is for the benefit of the judgment debtor and can be waived by him.

Whether an agreement in writing signed by a poor debtor is a waiver of the provision of Pub. Sts. c. 171, § 15, that no execution shall be issued within twenty-four hours after the entry of judgment is a question of law for the court.

The recognizance of a poor debtor is not void because he was arrested within twenty-four hours after the entry of the judgment against him if he signed an agreement in writing that judgment might be entered for the plaintiff and "execution issued forthwith."

CONTRACT, against the surety on the recognizance of one Joseph Dews, a poor debtor. Writ dated March 15, 1900.

In the Superior Court the case was tried before *Mason*, C. J., without a jury. The defence was that the execution on which Dews was arrested was void because served within twenty-four hours after entry of judgment in violation of Pub. Sts. c. 171,



§ 15, (R. L. c. 177, § 16.) It appeared that on August 20, 1896, the following agreement in writing was made between the plaintiff, by his attorney, and Dews: "Commonwealth of Massachusetts. Suffolk, ss. Superior Court. Washington National Bank v. Joseph Dews. It is agreed in the above entitled cause that judgment may be entered for the plaintiff and execution issued forthwith for the amount of \$4174.66 and costs. Charles H. Tyler, plaintiff's attorney. Joseph Dews."

The plaintiff offered to prove the following facts: That Dews was a resident of Rhode Island and in the course of his business had occasion to come to Boston frequently, and so, to avoid arrest on mesne process at a more inconvenient time, he and his attorney in Rhode Island came to Boston on August 20, 1896, with the understanding with the plaintiff that Dews was to be arrested on execution to be issued on that day, that he was to make application to take the oath for the relief of poor debtors and was to enter into a recognizance with the defendant as surety, and that the above agreement for judgment, execution and arrest were made in carrying out this understanding. This offer of proof was made for the purposes: 1. To aid in construing the meaning of the word "forthwith" in the agreement for judgment entered into between the parties, and 2, to show a waiver by Dews of his rights under Pub. Sts. c. 171, § 15.

The judge excluded this evidence and ruled that it was not admissible.

The plaintiff requested the following rulings:

1. That on the whole evidence the plaintiff is entitled to recover.

2. That a defendant in an action can waive the benefit of the provisions contained in Pub. Sts. c. 171, § 15, and that Joseph Dews by his agreement that execution might issue forthwith did as a matter of law waive such provisions, and the execution issued on the same date pursuant to that waiver is a valid execution.

3. That the execution against Joseph Dews issued on August 20, 1896, is a valid execution, the arrest thereon legal, and the recognizance valid and binding on the defendant.

4. That the execution against Joseph Dews issued on August 20, 1896, was at the most only irregular and not void, and, an



arrest thereon having been made, the defendant in this action cannot take advantage of such irregularity.

5. That the pendency of the bankruptcy proceedings [against Dews] did not operate as a stay or continuance of the poor debtor proceedings, or in any manner affect the rights of this defendant.

6. That the poor debtor proceedings were conducted in due form and according to law, and the condition of the recognizance was broken on May 31, 1899.

The judge refused to give any of these rulings, and ruled: "That upon the facts agreed, and those which are agreed if material, the action cannot be maintained."

The judge found for the defendant; and the plaintiff alleged exceptions.

*H. E. Bolles & B. D. Barker*, for the plaintiff.

*F. H. Williams*, for the defendant.

BRALEY, J. This is an action of contract to recover from the defendant as surety the penal sum of a poor debtor's recognizance. The defence is that the execution on which the principal was arrested is void because issued and served within twenty-four hours after entry of judgment. Under Rule 25 of the Superior Court judgment may be entered on the first Monday of each month in all cases then ripe for judgment, "and the court, or any justice, may at other times order judgment to be entered in any action." Pub. Sts. c. 171, § 1. St. 1885, c. 884, § 12.

The judgment on which the execution issued was not entered under the general order, and the clerk as a ministerial officer had no authority to make the entry without the sanction of the court.

It may be assumed that after the agreement of the parties had been made and filed an order was passed directing the entry of final judgment in favor of the plaintiff for the amount of its claim and costs.

An execution would follow as of course to enforce the judgment without further action by the court. But by our laws for more than a century it has been provided that no original execution shall be issued within twenty-four hours after judgment, nor after one year has expired "after the party is entitled to



sue out the same", and the clerk could not regularly issue such a writ contrary to these provisions. *Blanchard v. Waters*, 10 Met. 185, 187. St. 1783, c. 57, § 1. Rev. Sts. c. 97, §§ 5, 6. Gen. Sts. c. 133, §§ 15, 16. Pub. Sts. c. 171, §§ 15, 16.

If by a proper agreement of the parties it lawfully can be ordered by the court to issue before, in the absence of such direction no statutory authority is given the clerk in his discretion to determine judicially whether any case is thus placed without the statute, and in this case it further may be assumed that an order to issue a writ of execution accompanied the direction to enter judgment. See *Vose v. Deane*, 7 Mass. 280, 283.

It must be considered as settled that the invalidity of the writ may be shown and determined in a collateral suit. In a writ of entry to recover land set off to the demandant on an execution that had been issued and levied within twenty-four hours after rendition of judgment, it was held that it was open to the tenant to show these facts in bar of the action and that the execution was void. *Penniman v. Cole*, 8 Met. 496. See also *Briggs v. Wardwell*, 10 Mass. 356; *Fall River v. Riley*, 140 Mass. 488, 489. Although elsewhere there is authority that an execution erroneously issued cannot be attacked collaterally any more than an erroneous judgment, but the remedy is by a proceeding directly instituted in the case itself to have it set aside. *Wilkinson's appeal*, 65 Penn. St. 189. *Bacon v. Cropsey*, 3 Seld. 195, 199.

The entry of judgment, issuing of execution, and arrest of the defendant in the case before us all took place on the same day, and if the proceedings under the execution are void, the arrest was illegal, and the defendant cannot be held on his recognizance. *Penniman v. Cole*, *ubi supra*. *Smith v. Bean*, 130 Mass. 298. *Newmarket National Bank v. Cram*, 131 Mass. 204. *Atwood v. Wheeler*, 149 Mass. 96.

It is conceded by the plaintiff that if execution had issued without the defendant's assent it would have been a nullity. *Briggs v. Wardwell* and *Penniman v. Cole*, *ubi supra*.

But it is claimed that the debtor could waive the statutory provision made for his benefit, and if he properly did so then the execution was valid.

The case presented therefore is not one where an execution prematurely issued can be served properly after the limitation



has expired as in *Chesebro v. Barne*, 163 Mass. 79, or where proceedings under such an execution may be held valid on the ground that the debtor has waived the irregularity, but is a case where the arrest was made within a period, when by force of the statute alone no writ of execution could lawfully be in the hands of the sheriff for service, and also where if the debtor could lawfully waive this provision before execution, then it issued regularly.

In *Penniman v. Cole*, *ubi supra*, it was said by Hubbard, J., "The object of the provision we take to be this; to give a judgment debtor opportunity to examine into the correctness of the judgment, the accuracy of the calculation, where a computation is to be made, and to ascertain if the costs are properly taxed. . . . The time is given for the benefit of the judgment debtor . . . to enable him to ascertain that the judgment is correct, before execution goes forth against him."

If, however, the judgment debtor for reasons entirely satisfactory to him is content to waive the provision, and assents, the reason for the rule ceases, unless there is some requirement of public policy which should keep it in force.

It has been said that where laws are enacted on grounds of general policy their uniform application for the protection of all citizens alike is desirable, and an agreement to waive their provisions is generally declared invalid, but where they are designed solely for the protection of rights of private property, a party who may be affected can consent to a course of action, which if taken against his will, would not be valid. *Cooley*, Const. Lim. (7th ed.) 250, 251. *Desseau v. Holmes*, 187 Mass. 486. *Green v. Blunt*, 59 Iowa, 79.

This principle has been recognized and applied in the case of a debtor, who it was held could waive his right to the statutory exemption of property provided by Gen. Sts. c. 123, § 32, which otherwise was not liable to be taken on execution. *Dow v. Cheney*, 103 Mass. 181. See also Pub. Sts. c. 151, § 22, where express provision is made for waiver of appeal after a final decree in equity, and property of a defendant held under Pub. Sts. c. 161, § 53, to satisfy the decree may be at once levied upon.

The section of the statute under consideration being for his benefit, the judgment debtor could waive its provisions by a



proper agreement in writing made and filed in the case. *Dow v. Cheney, ubi supra. Williams v. Skillaber*, 153 Mass. 541, 543. *Heath v. Latham*, 7 Ired. 10. *Catlin v. Merchants' Bank*, 36 Vt. 572. *Sowle v. Pollard*, 14 La. Ann. 287.

Whether he effectually did so depends upon the construction of the written agreement, which is for the court. *Pratt v. Langdon*, 12 Allen, 544.

No claim is made that it was procured by fraud or mistake, and an examination of its terms discloses no latent ambiguity, for it clearly provides that the entering of judgment, and issuing of execution thereon, to which the debtor agrees, are to be deemed concurrent acts straightway to be performed. Having been duly made and filed, and proper proceedings thereunder having been taken by the court, the execution was issued lawfully, the arrest which followed also was lawful, and the recognizance entered into by the defendant was valid.

The third ruling requested "that the execution against Joseph Dews issued on August 20, 1896, is a valid execution, the arrest thereon legal, and the recognizance valid and binding on the defendant" should have been given, and the ruling "that upon the facts agreed, and those which are agreed if material, the action cannot be maintained" was wrong.

*Exceptions sustained.*

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JAMES A. ROCHFORD vs. THOMAS J. ROCHFORD & others.

Middlesex. January 11, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Mechanic's Lien. Mortgage, Of real estate.*

If a contract is made to build a house for a person who has not yet acquired the land on which it is to be built, and if that person on subsequently purchasing the land simultaneously gives a mortgage back to secure the purchase money, and then allows the building of the house to go on until completed under the contract made by him before he bought the land, under Pub. Sts. c. 191, § 5, the contractor who built the house can establish no lien for the labor and materials which will be good against the mortgagee who has recorded his mortgage.



PETITION, filed May 7, 1897, under Pub. Sts. c. 191, § 1, to enforce a mechanic's lien on certain real estate in Newton.

In the Superior Court the case was tried before *Mason*, C. J. By the auditor's report filed in the case it appeared that the petition was filed by James A. Rochford under an alleged oral agreement to erect a house on the land for the entire price of \$3,500. This agreement was with his son Thomas J. Rochford, who at the time of the oral agreement was alleged to have been made did not have title to the land, but got a deed later from the owner, Winsor Gleason.

A mortgage was given by Thomas J. Rochford to Winsor Gleason dated November 16, 1896, and was recorded the next day. A deed from Winsor Gleason to Thomas J. Rochford was executed and delivered on November 16, 1896. The auditor found that Winsor Gleason was the owner of the land, and that the delivery of the deed and that of the mortgage were simultaneous and part of the same transaction.

Thomas J. Rochford, the respondent named in the petition as the owner, died April 18, 1902, and his brother John C. Rochford was appointed administrator of his estate and attended the hearings before the auditor, although it did not appear whether he had entered his appearance in the cases or formally had become a party.

Martha M. Atkins, one of the respondents, claimed under a mortgage from Thomas J. Rochford to her dated February 10, 1897.

Issues were framed for the jury, which with the answers of the jury to each were as follows :

"1. Was the mortgage of Thomas J. Rochford to Martha M. Atkins, dated February 10, 1897, given in payment of, and in substitution for, the mortgage of said Rochford to Winsor Gleason, dated November 16, 1896? By direction of the court, the jury answer, No.

"2. What was the date of the contract under which the petitioner claims? The jury answer, November 9, 1896.

"3. On what date was the mortgage of Thomas Rochford to Winsor Gleason first both actually existing and duly recorded? The jury answer, actually existing November 16, 1896, recorded November 17, 1896.



"4. Was said mortgage to Winsor Gleason actually existing and duly recorded prior to the date of the contract under which the petitioner claims? The jury answer, No.

"5. What amount, if anything, is due the petitioner for labor performed and materials furnished on the house on said premises under said contract? The jury answer, \$917.46.

"6. When did the petitioner perform or furnish labor last under his contract? The jury answer, April 17, 1897.

"7. When did petitioner furnish and use material last under his contract? The jury answer, April 17, 1897.

"8. Has the petitioner knowingly and wilfully claimed more than is due him? The jury answer, No.

"9. Was the petitioner the real owner of the premises when he performed and furnished labor as he has alleged? The jury answer, No.

"10. Did the petitioner say or do anything to falsely or fraudulently induce the mortgagees mentioned in the first issue to take their mortgages, or to make payments thereunder, or any one claiming under said mortgages to do so? The jury answer, No."

The judge on consideration of the findings of the jury, the facts as reported by the auditor so far as applicable to the issues raised by the pleadings and not technically covered by the findings of the jury, and the record evidence of the conduct of the case, made a decree establishing the petitioner's lien for the sum of \$1,305.54. The judge made the following memorandum:

"The court rules that upon the findings of the jury the petitioner's lien is not subject to the mortgage from Thomas J. Rochford to Winsor Gleason dated November 16, 1896. See *Dixon v. Hyndman*, 177 Mass. 506."

The respondents alleged exceptions.

*E. A. Whitman*, for the respondents Atkins and Clark.

*D. Benshimol*, for the petitioner.

BRALEY, J. If the mortgage given by Thomas J. Rochford to Winsor Gleason is entitled to priority over an entire contract for labor and materials made between the petitioner and the mortgagor, any lien arising out of the contract attached to the equity of redemption only, and not to an unincumbered fee.

At the date of the contract Gleason owned the land, and al-



though negotiations were pending with Thomas J. Rochford for its purchase, it is found by the auditor that any work done before the title passed was performed without his consent as owner of the land, nor does it appear that any notice was given to him of an intention to claim a lien for materials.

No lien therefore would have attached for labor already performed or furnished, or materials furnished, if any, before the negotiations, if they had not ripened into a sale. *French v. Hussey*, 159 Mass. 206.

It is not shown clearly how far the work had progressed at the date of the deed, but it may be inferred that the construction of the house from the date of the contract to its completion proceeded in the usual manner without substantial interruption.

If no rights in the property were involved except those arising between the petitioner and the respondent Rochford, then, as owner of the land when the house was finished, he could be found by his consent to the continuation of the work after the conveyance to have ratified what had preceded, and as the lien attached from day to day as the work was done, or materials were furnished, his ratification would relate back to the beginning and embrace the whole amount. *Courtemanche v. Blackstone Valley Street Railway*, 170 Mass. 50, 58. *Anderson v. Berg*, 174 Mass. 404.

But against the mortgagee no lien attaches in such a case unless the contract out of which it springs is made after the mortgagor has become owner, for the legal title fixed by his ownership is the terminus from which incumbrancers, whether by way of a mortgage duly recorded or of a lien duly created, must reckon their rank to claims on the land. *Courtemanche v. Blackstone Valley Street Railway*, *ubi supra*. *McDowell v. Rockwood*, 182 Mass. 150, 154.

Before November 16, 1896, and until the delivery of the deed on that day the petitioner had no lien, or a contract which could result in a lien, for work or materials against Gleason the owner of the land.

By the transaction, when the title passed, Thomas J. Rochford is found to have gained only a momentary seisin of an unincumbered estate, which was immediately transformed into an equity



of redemption by his mortgage made to the grantor presumably to secure a part of the purchase money And as he made no contract with the petitioner after he became owner and before the mortgage was recorded, it retained priority over any lien that could grow out of their original agreement. *Webster v. Campbell*, 1 Allen, 313. *Ettridge v. Bassett*, 136 Mass. 314. *Saunders v. Bennett*, 160 Mass. 48. *Sprague v. Brown*, 178 Mass. 220, 224.

It is urged, however, by the petitioner that the decision made in *Dixon v. Hyndman*, 177 Mass. 506, supports his right as paramount.

The contract under which the lien was claimed in that case was made with the owners after they had received the title deed, and given a mortgage back, but before either had been recorded. Both the deed and mortgage were signed and acknowledged on April 29, 1897, again acknowledged on July 10, 1897, and recorded on July 12, 1897. There was evidence that the occasion of the delay was that another mortgage given to raise money for purposes of construction should have priority over the original mortgage, but it was found by the referee who heard the case on the evidence, that the title deed had been delivered on April 29, 1897, and the grantees were the owners of the land on which the lien was claimed on and after that date. The mortgage, though it had been delivered, was not recorded until after the date of the contract, and while it also was found that the petitioner knew of its existence before he furnished the materials for which he claimed a lien, it was held that actual notice was insufficient under the statute, and the lien outranked the unrecorded mortgage.

In the present case no contract was made after the respondent Rochford became the owner, within the time elapsing between the delivery and recording of the mortgage, and none is implied against the mortgagee from the subsequent adoption of the work and ratification of the original contract. *Courtemanche v. Blackstone Valley Street Railway* and *McDowell v. Rockwood*, *ubi supra*.

*Exceptions sustained.*



**MICHAEL HIGGINS vs. BRIDGET HIGGINS.**

Suffolk. January 12, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, Employer's liability, Proximate cause.*

If roofers using an extension ladder, supplied by their employer, which has a defective fastening at the junction of the two parts when extended, the two parts having become separated by reason of this defect, fasten them together in their own way with a rope found on the premises which is old and unfit for use, no superintendent being present at the time, and if another roofer who has not taken part in the fastening goes up this ladder and when called by a fellow workman to come down proceeds to do so and is thrown to the ground by the ladder giving way from the breaking of the unsound rope, the injured workman cannot recover from his employer for his injuries thus caused, the direct cause of the accident being not the original defect in the ladder but the negligence of his fellow workmen in failing to fasten the two parts of the ladder together securely by a sound rope.

BRALEY, J. This is an action of tort to recover for personal injuries received while in the defendant's employment. In the Superior Court at the close of the plaintiff's evidence a verdict for the defendant was ordered and returned, and the plaintiff brings the case to this court on exceptions to the ruling.

The declaration consists of five counts, one alleging negligence at common law for failure to provide safe and proper appliances; three under St. 1887, c. 270, § 1, either for defective ways, works or machinery, or negligence of the defendant's superintendent, or of an acting superintendent, or of some person intrusted with and exercising superintendence, while the fifth independently of any liability growing out of the relation of master and servant seeks to hold the defendant for an alleged breach of duty to him as a mere licensee.

It appeared from the evidence that the defendant was engaged in the general business of repairing roofs of buildings, and among other appliances used for this purpose was an extension ladder, which consisted of two ladders so arranged that the upper could be raised nearly to the end of the lower, by a rope and pulley adjusted to both. When raised it was held in place by fasteners or forked "dogs", which caught and rested upon



the top rungs of the lower ladder. It had become unfitted for general use because one of the fasteners was out of repair so that when the ladder was extended it would not catch or hold, while a new hoisting rope also was needed as the old one had become worn and weak.

It was undisputed that this condition had existed for at least a month before the plaintiff was injured, and had been called to the attention of the defendant's superintendent both before and on the day of the accident, but notwithstanding its want of repair he directed that it should be taken for use by the plaintiff, and two other men who were sent by him to remove slates from the roof of a building.

From this testimony the jury could have found that the ladder was an appliance at common law, or a part of the ways, works or machinery furnished the plaintiff with which to do his work, that it was defective, and that its want of repair was known to the defendant's superintendent and in the exercise of reasonable diligence should have been known to the defendant.

In obedience to the order the plaintiff, with his fellow workmen, took this ladder with others to be used in their work, but they were not accompanied by the superintendent, who gave no directions to them concerning the manner in which the slates were to be removed.

At first the plaintiff used one of the small ladders, by which he ascended to the roof of the piazza of the building, while the other men put up the extension ladder. It appears that when half way up it dropped because the fastener was sprung, and would not grip the rung. They then tied a rope found on the premises around the two nearest rungs where the upper and lower parts connected making it a "full length ladder fully extended", and placing it against the building ascended to the main roof.

At the request of one of them who was in charge of the work, the plaintiff subsequently went up this ladder from the piazza roof to the main roof, and later, when called to come down, as he stepped on the top part the rope which was old and unfit for use broke and he was thrown to the ground and injured.

There was evidence from one of the witnesses, that in a conversation on the day before the accident the plaintiff said, refer-



ring to the ladder, that "it wasn't fit to use." If this evidence had remained uncontradicted the action would fail, for he assumed the risk. But the plaintiff previously had testified that he was ignorant of the defect, and if his subsequent contradiction of this conversation may be considered as ambiguous, the jury were to interpret all his evidence, and they could have found that he was in the exercise of due care.

But if it was the defendant's duty to provide a suitable ladder which was not done, he cannot recover unless he shows that his injury was caused by her negligence.

The men were free to do the work in their own way, and to use the means provided as they might determine, and the request made or order given in compliance with which the plaintiff descended is not shown to have been the command of a person intrusted with or exercising superintendence. As there was no evidence to support the allegation that the injury was caused by an act of superintendence on the part of any one charged with that duty, the plaintiff is compelled to rely on the allegation of defective instrumentalities.

If the ladder furnished could be found to be unfit for use as an extension ladder, it was not used in the ordinary way, for the mechanical contrivance constructed by the men was the same as if two separate ladders had been made into one for the time being by the method employed.

There was no claim that for this purpose either was out of repair, and it is plain that if the rope which held them together had not broken the plaintiff would not have fallen. The men were not obliged to use the extension ladder as such if it was unsafe, but if they decided to combine its parts and thus make one of their own, this makeshift was not a part of the ways, works or machinery of the defendant, or an implement furnished by her for the use of her servants. Nor was it any the less a temporary device which they were at liberty to construct and use because made out of the parts of an apparatus which as a whole was rendered unsafe by reason of its defective means of adjustment if used as originally designed.

If the two were not securely fastened by a sound rope, and from this cause the upper part fell while the plaintiff was using it, his accident was caused by the carelessness of his fellow ser-



vants. Even if the jury might find that originally the defendant was in fault, yet the uncontradicted evidence shows that the intervening and proximate cause of the plaintiff's injury was their negligence, for which she is not responsible. *Lynn Gas & Electric Co. v. Meriden Ins. Co.* 158 Mass. 570, 575. *McGuerty v. Hale*, 161 Mass. 51. *McKay v. Hand*, 168 Mass. 270, 278. *Stone v. Boston & Albany Railroad*, 171 Mass. 536, 539, 540.

No consideration of the fifth count is required, for under the facts shown the plaintiff being a servant of the defendant was not on the premises as a licensee.

*Exceptions overruled.*

*J. P. Crosby*, for the plaintiff.

*W. H. Hitchcock*, for the defendant.



ELIZA V. CROWELL, administratrix with the will annexed,  
vs. ELLEN MOLEY.

Middlesex. January 12, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Evidence*, Presumptions and burden of proof. *Contract*, What constitutes.

A plaintiff does not sustain the burden of proof which the law imposes on him if the facts which he proves are as consistent with the defendant's view of the case as with his own.

In an action on an alleged oral contract to pay personally a promissory note of the deceased father of the defendant, if the plaintiff contends that in consideration of the defendant's promise to pay the note the plaintiff discharged the estate and accepted the defendant as his sole debtor, but the evidence produced by the plaintiff is consistent with the acceptance by the plaintiff of a voluntary promise of the defendant not binding and known not to be binding in preference to his chance of recovering the amount of the note or a dividend from the estate, this does not sustain the burden of proof imposed upon the plaintiff by the law.

CONTRACT on an alleged oral contract of the defendant to pay a promissory note for \$500 made by the defendant's father to the plaintiff's testator as stated in the opinion. Writ dated January 3, 1903.



In the Superior Court the case was tried before *Wait, J.*, who ordered a verdict for the defendant, and after verdict reported the case for determination by this court. If the ruling of the judge was correct judgment was to be entered on the verdict; otherwise, the verdict was to be set aside and the case was to stand for a new trial.

*J. Noble, Jr.*, for the plaintiff.

*F. Burke*, for the defendant.

**LORING, J.** This is an action brought by the widow and administratrix with the will annexed of the payee of a promissory note, on an alleged promise by a daughter of the maker to pay the amount of the note out of her own funds.

The payee died October 17, 1897, that is to say after the note was outlawed under the special statute of limitations as to actions against administrators and executors. R. L. c. 141, § 9. No direct evidence was put in by the plaintiff of any contract between the payee and the defendant. The plaintiff testified that she had had a conversation with her testator late in the summer of 1897, that is to say, after the two years for bringing suit against the executors of the maker had expired. But although this conversation, if it was not a private conversation between husband and wife, would be admissible under R. L. c. 175, § 66, the plaintiff did not testify what her testator said was the reason why the note was not collected of the estate.

What the plaintiff did testify to was that the indorsement dated January 1, 1897, on the back of the note is in the handwriting of her testator. This was a payment of interest to date, and it is to be observed was made before the two years had expired. The plaintiff also testified that she had had a number of conversations with the defendant, the first one being early in the spring of 1898, and the last on Christmas, 1899. At these conversations, or at one of them, the plaintiff had said in substance, "You know why the note was not entered," and the defendant answered that she did and that she would pay it when she could. At one of these interviews she told the plaintiff that she "could not force the thing." The plaintiff also testified that the defendant paid to her an open account, due from the maker of the note, between the spring and fall of 1898; and on September 22, 1899, the defendant paid \$25 on the note in question.



In addition to her own testimony the plaintiff put an attorney on the stand, who testified that the matter now in suit was put in his hands for collection in December, 1900, and that after writing several letters to the defendant, to which he received no answer, he called on her in the summer or early fall of 1901. At this interview the defendant said that she understood that she had not got to pay the note unless she wanted to, but she would pay it if nothing was done to collect it; that Mr. Crowell, the plaintiff's testator, understood that, and the plaintiff understood it.

The plaintiff contends that this evidence made out a case under the rule laid down in *Griffin v. Cunningham*, 188 Mass. 505, following *Carwell v. Fellows*, 110 Mass. 52. It is to be noted in the first place that what the plaintiff has undertaken to make out is something more than a forbearance to sue induced by a voluntary promise to pay. She has undertaken to make out that a bargain was made, and in the second place that the bargain made was that in consideration of the defendant's promise to pay, the plaintiff discharged the estate and accepted the defendant as her sole debtor.

The plaintiff has not put her case on the ground that she proved that the defendant promised to pay the note in consideration of forbearance by the holder without a novation by the discharge of the estate and an acceptance of the defendant as the sole debtor and that by reason of the defendant's interest in the estate such a bargain is not within the statute of frauds. It is not necessary therefore to consider that.

In our opinion the plaintiff wholly failed to make out in evidence the case she contends that she made out.

In the first place, if the bargain made had been a discharge of the estate from the note, the note should have been surrendered by the plaintiff in place of being kept by her.

In the second place, the plaintiff testified that Crowell (the payee her testator) had talked with her on the subject, and yet, so far as the evidence went, never had stated that such a bargain was made.

In the third place the defendant's statement made to the plaintiff that she would pay the note was coupled with a statement that the plaintiff "could not force the thing."



Lastly, there was no evidence that the defendant's father left any estate. By his will he made provision for his son and two daughters, the executrices, but there is no evidence that anything passed under it. For aught that appears his estate was insolvent, and the plaintiff's testator preferred a voluntary promise of the defendant not binding on her and known not to be binding, to the dividend he was entitled to on proof of the note. On the evidence this was as probable an explanation as any other of the defendant's admission that she knew why the note was not entered against the estate. Under these circumstances the plaintiff has not sustained the burden of proof. Where the facts proved are as consistent with one view of the case as with another, the plaintiff has not sustained the burden of proving the second. *Toland v. Paine Furniture Co.* 175 Mass. 476.

The plaintiff also contends that the defendant promised to pay the note at the interview between the defendant and the plaintiff's attorney in the summer of 1901, in consideration of the plaintiff's agreeing not to insist on the defendant's filing an inventory of her father's estate and an account of her doings as executrix. But the evidence was that at this interview the plaintiff's attorney suggested to the defendant that she could be forced to file an inventory and to account, and asked her to give him her personal note. In place of doing so or promising to do so the defendant went no further than to say she would see her lawyer, and her lawyer subsequently told the plaintiff's attorney that the defendant refused to give her personal note.

*Judgment on the verdict.*



## CHARLES B. PERKINS vs. CHARLES S. HANKS..

Suffolk. January 16, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, &amp; BRALEY, JJ.

*Contract, Construction.*

Where a contract in writing for the preparation of plans by an architect, after the adjustment of an existing indebtedness for services previously rendered, stipulates for similar services by him in the future and contains the statement "The architect's commission on which, at five per cent, is not to exceed the value of \$350," and immediately after contains the statement "It is further mutually understood and agreed that the equity of said before described land is given as security for a further payment of \$250, which sum shall, when paid, be considered to be full payment for said above last named plans," the explicit agreement as to the price to be paid controls the previous mention of a rate of compensation, and if a jury finds that the architect made the plans called for by the contract he is entitled to recover the agreed price of \$250.

CONTRACT upon a contract in writing for compensation for services as an architect. Writ in the Municipal Court of the City of Boston, dated December 8, 1902.

On appeal to the Superior Court the case was tried before Wait, J. The agreement sued upon was as follows:

"This agreement, made this twelfth day of October, 1900, by and between Charles Bruen Perkins, of Boston, in the County of Suffolk, and Commonwealth of Massachusetts, party of the first part, and Charles Stedman Hanks, also of said Boston, party of the second part, Witnesseth: That, whereas, said party of the second part owes to said party of the first part the sum of one hundred and fifty (150) dollars for services rendered, and, Whereas, the said party of the second part is desirous of receiving further services from the said party of the first part, as architect,

"Now, therefore, this agreement witnesseth said party of the second part agrees to pay said party of the first part the sum of one hundred and fifty (150) dollars, in cash, immediately upon the signing of this agreement, and to give to the said party of the first part a quit-claim deed of the equity in a certain parcel of land situated and described as follows: A certain piece or



parcel of land situated in Stoneham, in the County of Middlesex, and bounded and described as follows, [description] which parcel of land is now subject to a mortgage of one hundred and fifty (150) dollars. And the said party of the first part hereby agrees to draw certain plans at the direction of the said party of the second part, for houses to be built upon other lands of said party of the second part.

"The number and size of said plans to be agreed upon mutually by said above named parties, the architect's commission on which, at 5 per cent, is not to exceed the value of three hundred and fifty (350) dollars, and to be done as soon as they can be reasonably and properly finished, after directions received from said party of the second part.

"It is further mutually understood and agreed that the equity of said before described land is given as security for a further payment of two hundred and fifty (250) dollars, which sum shall, when paid, be considered to be full payment for said above last named plans. Said payment to be made at the expiration of two years from the date hereof, or any prior time, in cash, by said party of the second part to said party of the first part, who on payment of said sum of two hundred and fifty (250) dollars, shall convey, by similar deed as that received by him, the above described lot to said party of the second part, provided said party of the first part has not before that time sold the said equity to some third party at a price satisfactory to him, the party of the first part; which he is hereby authorized to do if he so elects, and which sale shall release said party of the second part from the payment of said two hundred and fifty (250) dollars, or any part thereof.

"It is further agreed that all betterments or other charges of every nature, except the annual taxes, assessed upon the land during the time that said party of the first part shall hold any title to the same, shall be paid in all cases by said party of the second part, whether assessed by the town of Stoneham, or by any private individual or individuals; except, also, interest on the mortgage aforesaid.

"In witness whereof, we, the above named parties, have interchangeably set our hands and seals the day and date first above written. Charles Bruen Perkins, Chas. Stedman Hanks."



The defendant requested five instructions, of which the judge gave the first and third, and refused to give the following, submitting the case to the jury:

"2. That under the terms of this agreement the defendant was under no liability to pay the plaintiff any sum whatever, except the regular commission upon such plans, if any, as the plaintiff has made in accordance with the specific directions and conditions given and imposed by the defendant."

"4. That the plaintiff is not entitled to recover anything under the declaration in this case, unless plans were made by him in accordance with the specific directions and conditions of the defendant, and unless the commission on said plans at five per cent would amount to at least \$250.

"5. That upon the whole case the plaintiff cannot recover."

The jury, after consideration, made the following request for further instructions: "We are all agreed that the plaintiff did his part and should be paid. Does the contract bind in that case the defendant to pay \$250? His plans at five per cent, as mentioned, would be over \$350. At one and one half per cent, as mentioned, he only earned \$225. Would ask for instructions on these points."

Thereupon the judge instructed the jury that if they found the contract had not been terminated, and that the plaintiff had done all the contract required, their verdict must be for \$250, with interest, the commission for the particular plans drawn being immaterial under the terms of the contract.

The jury returned a verdict for the plaintiff in the sum of \$271.46; and the defendant alleged exceptions.

*E. B. Hale & F. E. Dickerman*, for the defendant.

*E. Everett & G. H. Russ*, for the plaintiff.

BRALEY, J. The contract out of which this suit arises consists of two distinct parts. It first provides for an adjustment of an existing indebtedness due the plaintiff for services previously rendered as an architect, and then stipulates for similar services by him in the future. Accordingly the plaintiff agreed to prepare plans, the number and size of which were to be mutually agreed upon, that were to be used in the construction of houses to be built upon land of the defendant. These plans were to be ready for use as soon as they could be reasonably and



properly finished, and after he had received directions from the defendant, and the issue of fact at the trial was whether the plaintiff had performed his part of the contract.

Whatever the reasons may have been which led to the insertion of the statement, "The architect's commission on which, at five per cent, is not to exceed the value of \$350", from which if nothing further appeared a promise to pay a percentage not exceeding that sum if the plans were made according to the agreement might be implied, there immediately follows a clause making an express provision for payment. It is there stated, "It is further mutually understood and agreed that the equity of said before described land is given as security for a further payment of \$250, which sum shall, when paid, be considered to be full payment for said above last named plans."

This explicit agreement of parties must be held to control the price to be paid for the plaintiff's work rather than the rate of compensation to be implied from the language found in the preceding paragraph. *Morrill & Whiton Construction Co. v. Boston*, 186 Mass. 217.

It must be construed to mean that the parties agreed that if the plaintiff furnished the plans specified he was to receive the amount fixed for them at the expiration of two years from the date of the contract, unless in the meantime he had sold the land held as security, and taken the proceeds, in which event the defendant would be released from all liability of further payment; or if the plaintiff had not sold it, upon exercising his option he could discharge his debt and receive a reconveyance.

It appears from the plaintiff's evidence that at the request and under the direction of the defendant, he drew general plans for a house, and then from these prepared a set of sketch plans, all of which were delivered to the defendant who accepted and retained them, and that during the two years from the date of the contract whenever called upon by him he had been ready and willing to prepare building plans. The contention of the defendant was that his instructions to the plaintiff were limited to the preparation of plans for a house that could be built for not more than a certain sum above the foundation, and as the plaintiff never succeeded in drawing plans that met this requirement, he did not accept them, and because of a failure to com-



ply with this request, or follow directions given to him, he did not ask or demand his further services. Upon this conflicting evidence the jury have found in favor of the plaintiff, and the argument that the plaintiff by simply being ready and willing to offer performance during the life of the contract would have the right to receive at least the sum expressly stipulated for, without having done any work, becomes purely speculative. For the real question presented is not whether the plaintiff being disposed at all times to keep the agreement, and no request having been made by the defendant, would be allowed thereby without rendering any actual service to recover to this extent; but is rather, having performed it upon such a request, what amount is due to him.

Having done all that he agreed to do, and it appearing that he has not sold the land, and still holds it, and that two years have expired within which the defendant could pay in money, and redeem, but has not done so, the plaintiff is entitled to hold his verdict.

*Exceptions overruled.*

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MATTHEW M. JORDAN vs. OLD COLONY STREET RAILWAY  
COMPANY.

Suffolk. January 16, 17, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, On highway, Contributory.*

If a man who wants to pull down one leg of his trousers, and who has at least the whole of a highway including a sidewalk for foot passengers to choose from for performing that act, selects for the purpose the track of a street railway near a corner from which an electric car may emerge at any moment and strike him in eight seconds, and, if while stooping in such a place for the purpose named with his foot three inches over the rail he is struck by a car before he looks up, he cannot be found to be in the exercise of due care.

LOBING, J. This is an action for being run over by a car of the defendant railway company, shortly after eleven o'clock at night, while it was going from Dedham toward Hyde Park.



The presiding judge ordered a verdict for the defendant on the conclusion of the plaintiff's case, and the case is before us on the plaintiff's exceptions.

The plaintiff's evidence showed that the plaintiff had drawn his pay early in the evening in question, and had been drinking in various bar rooms from eight o'clock or thereabouts until eleven, when he took a car for home. He testified that he had had one glass of whiskey and five glasses of beer, and was sober. He lived in Hyde Park, and with his companions got off at Knight Street. They then walked up Knight Street in the direction of the plaintiff's residence, and sat on a fence on the left hand side of the road going toward Dedham. This fence was a little over three feet from the nearest rail of the defendant's tracks. There was no sidewalk on that side of the road, and there was a sidewalk on the other side of it. After chatting for a while on the fence, the plaintiff and his companions got down, his companions started to the right to go to their homes, and the plaintiff started in the opposite direction, diagonally across the track, to get to the sidewalk on the other side of the road, to go to his home. He testified that while sitting on the fence he had pulled up his trousers; that when he began to walk they interfered with him, and for that reason he tried to shake them down by kicking out his legs as he started to walk from the fence; that the left leg of his trousers was thus shaken down but the right leg remained up, and he stopped to pull it down with his hands; that when he stopped for this purpose he was standing between the fence and the nearer rail, with his right leg about three inches over that rail, bending over in a stooping position; and that while he was so occupied a car came from Dedham, hit him on the head, and ran over his right leg. It was a clear night. The moon was shining. No question was made as to the car having been lighted as usual. At the point where the plaintiff was sitting on the fence to the point where he was run over, there was an unobstructed view of a car coming from Dedham, for a distance of two hundred and thirty-four feet in the daytime. Beyond that the tracks were hidden by a row of willow trees. The road in question going toward Dedham curved to the left and ran along a mill pond, the row of trees being in the line of the fence between the rails and the pond. The plaintiff testified that when



he got down off the fence, he stretched himself and looked to the right and left to see if a car was coming, and did not look again. His companions testified that he was sober. His companions also testified that the car was running from eighteen to twenty miles an hour. He testified that he took four steps from the fence before he stopped to pull down his trousers, and on direct examination that it might have taken half a minute or more to pull down the right leg of his trousers. On cross-examination he indicated what he meant by half a minute, and the time proved to be seven seconds.

If the car was running twenty miles an hour, it would take eight seconds for it to run from the point two hundred and thirty-four feet away (where the view of it was unobstructed in the daytime), to the point where the plaintiff was when he was struck.

We are of opinion that whatever may be the explanation of this accident the plaintiff failed to show that he was in the exercise of due care. The evidence as a whole (including much that we have not found it necessary to refer to) indicates that the plaintiff was drunk, and that that is the true explanation of the accident. But we cannot say as matter of law that the jury could not find that he and his companions were telling the truth as to his being sober. Again, it is hard to believe that a man who was sober would spend half a minute, or even seven seconds, in pulling down one leg of a pair of trousers. But we cannot say as matter of law that if he was sober he did not do so. What we do say, however, is that when a man has at least the whole highway, including a sidewalk devoted to foot passengers alone, to choose from, it is not the act of a prudent man who wants to pull down one leg of his trousers to select a street railway track eight seconds around and away from a corner from which an electric car may emerge at any moment, and to stoop over to pull down his trousers without again looking up until he is run over.

In *Carlson v. Lynn & Boston Railroad*, 172 Mass. 388, on which the plaintiff mainly relies, the plaintiff was walking on and along the only footpath that there was. So in *Robbins v. Springfield Street Railway*, 165 Mass. 30, the plaintiff in driving on the way in question had to drive across the track of the de-



fendant railway. But in a case like the one at bar there is no necessity for pulling down the leg of one's trousers, and a street railway track is not the place for attending to that unnecessary act if it is to be done at all.

The case is somewhat like and falls within the principle applied in *Gleason v. Worcester Consolidated Street Railway*, 184 Mass. 290; *Donovan v. Lynn & Boston Railroad*, 185 Mass. 533; *Itzkowitz v. Boston Elevated Railway*, 186 Mass. 142.

*Exceptions overruled.*

*J. J. Feely*, (*R. Clapp* with him,) for the plaintiff.

*D. E. Hall*, for the defendant.



JAMES L. KENNY *vs.* BOSTON AND MAINE RAILROAD.

ANNIE SAUNDERS *vs.* SAME.

Suffolk. January 17, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Railroad, Liability under Pub. Sts. c. 112, § 213. Negligence, Gross.*

In an action against a railroad company under Pub. Sts. c. 112, § 213, for injuries at a railroad crossing to which neglect of the defendant to give the signals required by law contributed, the burden of showing gross negligence on the part of the plaintiff is upon the defendant, and it does not establish this defence that the plaintiff has not shown affirmatively that he was in the exercise of due care, or that the defendant has introduced evidence on which the jury would be warranted in finding that the plaintiff was guilty of gross negligence, unless they have found so.

TWO ACTIONS OF TORT under Pub. Sts. c. 112, § 213, (*R. L. c. 111, § 268*,) for injuries to the respective plaintiffs at a railroad crossing of the defendant alleged to have been caused by neglect of the defendant to give the signals required by law. Writs dated December 17, 1901.

In the Superior Court the cases were tried together before *Holmes, J.*, who refused to rule that the plaintiffs could not recover, and submitted the cases to the jury. The jury returned verdicts for the plaintiffs, for James L. Kenny in the sum of



\$2,600, and for Annie Saunders in the sum of \$1,800. The defendant alleged exceptions in each case.

*A. R. Tisdale*, for the defendant.

*W. T. A. Fitzgerald*, (*M. L. Jennings* with him,) for the plaintiffs.

LOBING, J. The only question raised in these two cases is whether the plaintiffs were as matter of law guilty of gross or wilful negligence within Pub. Sts. c. 112, § 213.

We are of opinion that these cases are like *Brusseau v. New York, New Haven, & Hartford Railroad*, 187 Mass. 84, and not like the cases of *Debbins v. Old Colony Railroad*, 154 Mass. 402, and *Emery v. Boston & Maine Railroad*, 173 Mass. 136.

In this case the two plaintiffs, James Kenny and Annie Saunders, were walking down Webster Street in East Boston, across the railroad tracks which are laid over that street at grade. There are ten tracks at this crossing, with gates at each end. These gates are one hundred and forty feet distant one from the other. The gates are operated from a gateman's shanty between the fifth and sixth tracks, that is, about the middle of the crossing. The two gates are worked by separate cranks. Both plaintiffs were familiar with the place. When they came on to the crossing the gates were up. They were then walking on the right hand side of the street. On their right there was a "string of cars" standing on the second track. When they passed the northwesterly gate Kenny looked to the left and saw that the tracks were clear. When Kenny reached the first rail of the second track he looked to the right. On Kenny's right there was in fact a shifting engine on the fourth track then standing still, not seen by Kenny because it was behind the "string of cars" on the second track already spoken of. When Mrs. Saunders, the other plaintiff, reached the second rail of this second track she looked to the right and saw this engine. From the second track the two plaintiffs walked along, side by side, in a diagonal direction to reach the other side of Webster Street, for some thirty or thirty-five feet, talking together, when they were struck by this shifting engine on the fourth track, which had started up without (so the jury were warranted by the evidence in finding) the bell being rung or the whistle being sounded. When about to cross the third



track Kenny again had looked to the left. He did not remember whether he listened or not. When struck, Mrs. Saunders was on the first, and Kenny on the second, rail of the fourth track. Both plaintiffs heard the rumbling of the engine just as they were hit.

A witness called by the plaintiffs testified that the engine started up when the plaintiffs were between the second and third tracks, and that the "engine was going at a pretty high rate [of speed] for a crossing." He also testified that the gateman got the gates down just as Kenny was struck. The plaintiffs, or one of them, admitted that the gateman was known to them to be old and crippled, and had difficulty with the gates; also that very often engines have come over the crossing when both gates were up. The plaintiff Mrs. Saunders, who saw the engine standing still, testified that it was then "half way between Marginal and Webster Streets, but a little nearer Webster Street." (These streets are two hundred and forty feet apart.) But the witness called by the plaintiffs hereinbefore referred to testified that while the engine was standing still it was "about an engine length from the south sidewalk of Webster Street."

The defendant's argument in support of its contention that the plaintiffs were guilty of gross or wilful negligence as matter of law is in substance that the plaintiffs were familiar with the crossing, the day was clear and bright, and they knew no reliance could be placed on the gates being up; that engines went over the crossing when both gates were up; that the engine made a rumbling sound for a considerable distance, and yet they kept on for thirty or thirty-five feet, engaged in conversation, — Mrs. Saunders, after she discovered the presence of the shifting engine, without looking to the right or left, and Kenny without looking again to the right; and he does not remember whether he listened for a train or not; that the gateman was lowering the gates in plain view of the plaintiffs, and that the engine started up when the plaintiffs were about twenty-five feet away from the point of collision.

Most of these facts must be taken to have been made out by the defendant. The burden of proving gross or wilful negligence is on the defendant. *McDonald v. New York Central &*



*Hudson River Railroad*, 186 Mass. 474. *Walsh v. Boston & Maine Railroad*, 171 Mass. 52. *Sullivan v. New York, New Haven, & Hartford Railroad*, 154 Mass. 524. *Copley v. New Haven & Northampton Co.* 136 Mass. 6. That fact makes a difference. For example, the exceptions state that Mrs. Saunders testified that "after she saw the engine, she walked right along for thirty feet, and knew nothing more till she heard a rumbling noise and got hit." That does not warrant the defendant who has the burden of proof in this connection in arguing that the jury were bound to find as matter of law that Mrs. Saunders "kept on . . . not looking to the right or the left." The jury would be warranted in so finding, but that is a different matter. Again, the jury were not bound to find that the engine started up when the plaintiffs were about twenty-five feet away from the point of collision. One witness testified that they were between the second and third rails when the engine started, but he also testified that the engine, when standing still, was only an engine length from Webster Street, and that it came "at a pretty high rate" of speed.

Assuming the other facts relied on by the defendant, we are of opinion that however it might have been had the plaintiffs had the burden of proving that they were in the exercise of ordinary care, it cannot be said that the defendant as matter of law sustained the burden of proving that the plaintiffs were guilty of gross or wilful negligence.

*Exceptions overruled.*



WILLIAM M. BURR vs. BEACON TRUST COMPANY  
& (before discontinuance) another.

Suffolk. January 18, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Agency, Conflicting interests. Broker. Contract, Validity.*

The clerk of a person who has borrowed money from a bank, on collateral which the bank considers of insufficient value, properly can act as agent of the bank in procuring a person to purchase the loan from the bank, where each employer knows of his employment by the other, and a promise of the bank to pay the clerk a commission for performing this service is enforceable against it, the original borrower having no interest antagonistic to that of the bank in the transaction and the general employment of the clerk requiring the performance of separate and different duties from those which he performs as agent of the bank.

CONTRACT for \$500 as a commission promised to the plaintiff by the defendant trust company for procuring a person to take a certain loan off its hands. Writ dated August 29, 1901.

At the trial in the Superior Court before *Wait*, J. the plaintiff discontinued as to John A. Gale, president of the trust company, joined as a defendant, and the case proceeded against the defendant trust company alone. The jury returned a verdict for the plaintiff in the sum of \$573.50; and the defendant alleged exceptions to the refusal of the judge to make certain rulings which are stated in the opinion of the court.

*M. Dolan*, for the defendant.

*C. W. Bartlett & J. P. Russell*, for the plaintiff, were not called upon.

LORING, J. This is an action to recover a commission of \$500 which the defendant, through its president, promised to pay to the plaintiff if he would get some one to take up loans to the amount of \$60,000 which the defendant had made to one Carden on pledge of certain wool as collateral. The evidence warranted the jury in finding that the plaintiff was a clerk employed by Carden, and that on one occasion he called at the defendant's banking rooms in Carden's behalf, as to \$25,000 of this loan, which Carden wished to have renewed. In connection with this application of Carden for a renewal the wool was valued, and



the defendant asserted that the value was not sufficient to make the loan a desirable one. At an interview in this connection between the plaintiff acting for Carden and the defendant's president, the president offered to pay the plaintiff \$500 if he would get some one to take up the whole loan. This was reported by the plaintiff to Carden, and Carden "told him to go ahead and see if he could do it, that he would be very glad to have him earn the money." The loan was taken up by some one procured by the plaintiff, and the \$500 was demanded by him of the defendant. Upon the defendant's refusing to pay it this action was brought.

The jury were told in substance that to recover the plaintiff must satisfy them that he was employed by the defendant, and with the understanding that he should be paid for his services by the defendant; that if he attempted to act for or serve directly or indirectly both seller and buyer he could not recover, and that he must show that he had no interests of any party in the transaction antagonistic to those of the defendant.

In addition the defendant asked for the following rulings, which were refused: "1. Upon all the evidence, the plaintiff is not entitled to recover"; "6. The plaintiff must show that in rendering any services to the defendant he acted in entire good faith towards the defendant, and solely in its interest and not in the interest of any other person"; "8. The plaintiff must be considered the agent of the party by whom he was originally employed"; "10. If you find that the plaintiff, at or during the time of the transaction, was in the employ of Carden, and was acting within the scope of his employment in his dealings with the defendant Gale, you may assume that he was working in the interest of his employer, Carden; 11. If you find that the defendant knew of the plaintiff's employment with Carden, the defendant had a right to assume that the plaintiff was acting solely for and in the interest of Carden."

The only argument made in support of these rulings is that the plaintiff was acting solely in Carden's interest and not in the interest of the defendant, and therefore the plaintiff cannot recover.

The transaction for which the defendant agreed to pay the plaintiff this commission of \$500 was finding a customer to buy



from it Carden's notes in amount of \$60,000. Carden had no interest in that trade as a trade, and it is only in that sense that the rule applies forbidding a broker to act when he has, or is acting for one who has, an antagonistic interest. The only party who had an interest antagonistic to that of the bank was the purchaser, and it is not pretended that the plaintiff acted for him.

The duties owed by the plaintiff as a clerk to his employer, Carden, are different from those which he assumed when he undertook to find a customer for Carden's notes held by the defendant trust company. As his relation to each was known to the other, there is nothing in the cases cited by the defendant (*Rice v. Wood*, 113 Mass. 133; *Holcomb v. Weaver*, 136 Mass. 265; *Alvord v. Cook*, 174 Mass. 120; *Veasey v. Carson*, 177 Mass. 117) which made it necessary to give any of the rulings requested.

No other argument has been made in support of them.

*Exceptions overruled.*

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### SARAH E. HARVEY vs. CITY OF MALDEN.

Middlesex. January 18, 19, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, On highway, Contributory. Way.*

A woman on a bicycle, who riding on the half of a city street which is open to travel while the other half is being excavated by a street railway company in laying a track, and seeing a furniture wagon with an overhanging load approaching attempts to pass between the wagon and the excavation and to avoid being struck by the load finds herself obliged to turn toward the excavation and falls into it, cannot be found to be in the exercise of due care so as to enable her to maintain an action against the city for injuries thus sustained, even if the absence of a barrier to guard the excavation constituted a defect in the highway.

MORTON, J. This is an action of tort to recover damages for injuries sustained by the plaintiff in July, 1901, in consequence of an alleged defect in Salem Street, in the defendant city. At



the close of the plaintiff's evidence the presiding judge directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to the ruling thus made.

Salem Street is a public way running east and west. At the time of the accident a street railway company was laying a track in the southerly half of the street and only the northerly half was open to travel. The street railway company had made an excavation from the centre of the street to the southerly curb. The excavation was from six inches to three feet deep and extended at least an eighth of a mile. The plaintiff had been over the road once before in the morning of the same day and knew of the existence of the trench. She was an experienced bicycle rider, and at the time of the accident was upon her bicycle going in an easterly direction to her home. She entered upon that part of the street that was open for travel, and after she had proceeded some distance met a team going in the opposite direction and loaded with furniture. She turned to the right to pass the team, being at the time quite near the excavation, and when opposite the horse realized that there was not room to pass on account of the overhanging of the load, and to save herself from being struck was obliged to go so near the line of the excavation that she fell into the excavation and received the injuries complained of. The accident happened at about 2.30 P. M., and at the place where it occurred the northerly half of the street which was open to travel was thirteen feet from the curb to the northerly rail of a street railway track already laid, four feet six inches from that to the other rail, and six inches from that to the edge of the excavation.

Assuming without deciding that in order to render the street reasonably safe and convenient the city was bound to erect a suitable barrier or railing along the line of the excavation, and also assuming that the plaintiff was rightfully upon that part of the street which was open to travel, and that her previous knowledge of the condition of the street was consistent with due care on her part in entering thereon, there was nothing in the circumstances to justify her in entering on her bicycle on that part of the street next or near to the excavation and continuing there till she found herself forced by the approaching team so near the excavation that in turning out she fell into it and received the



injuries complained of. She could have stopped and have got off from her bicycle. It also is to be noted that there was ample room for her to pass in safety between the team and the curbing on that side of the road, and there was nothing to prevent her from turning out and doing so. We are forced to the conclusion that her own want of due care contributed to her injury.

*Exceptions overruled.*

A. C. Fall, for the plaintiff.

J. Wiggin, for the defendant.

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NORTH AVENUE SAVINGS BANK vs. HERBERT W. HAYES.

Suffolk. January 19, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Bills and Notes. Surety.*

A surety upon a promissory note, which is secured by the note of another person pledged as such security by his co-surety, is not discharged from liability because without his knowledge or consent the maker of the note held as collateral by an arrangement made through the co-surety was allowed to renew it after maturity by giving in exchange another note payable six months later which at maturity was paid only in part, unless he shows that the acceptance of the new note for the note surrendered resulted in some wrong to him, and if it does not appear that had the surrendered note been retained more money could have been collected on it than was collected on the new note.

CONTRACT by a savings bank against a surety and joint promisor upon a promissory note held by the plaintiff. Writ dated November 11, 1901.

In the Superior Court the case was presented upon an agreed statement of facts. That court gave judgment for the plaintiff in the sum of \$2,928.39; and the defendant appealed.

The note sued upon was as follows: "\$2500.00. Cambridge, Dec. 10, 1895. For value received we Cornelius Dorr as principal, and Cornelius Dorr & Son and Herbert W. Hayes as sureties, jointly and severally promise to pay to the North Avenue Savings Bank, or order, the sum of Twenty-five hun-



dred Dollars, on demand, at the office of said Savings Bank, in Cambridge, with interest at the rate of six per cent per annum, payable semi-annually, on the tenth day of January and the tenth day of July in every year, so long as the said principal sum or any part thereof shall remain unpaid. Cornelius Dorr, Cornelius Dorr & Son, H. W. Hayes. Signed in the presence of Milton L. Walton."

"Secured by note of A. W. Rucker for \$2500."

On December 10, 1895, Cornelius Dorr borrowed from the plaintiff \$2,500, for which he gave the above note in compliance with the provisions of Pub. Sts. c. 116, § 20, cl. 6. The plaintiff for its further protection also took from the firm of Cornelius Dorr and Son the promissory note of A. W. Rucker, referred to by the above memorandum on the face of the note, dated on or about December 1, 1895, for \$2,500, payable in one year to the order of C. Dorr and Son, and by them indorsed generally.

On the maturity of the note of A. W. Rucker held by the plaintiff it was not paid, and Rucker in place thereof executed a renewal note for the same amount, dated December 1, 1896, payable in six months after date to the same firm of C. Dorr and Son, which renewal note was indorsed generally by the firm, and then was delivered to the plaintiff, which surrendered in exchange the Rucker note then overdue and unpaid. The defendant was ignorant of and did not consent to the exchange.

The Rucker renewal note was not paid at maturity, and thereafter the plaintiff caused an action to be brought on it, and obtained judgment, whereon it collected the sum of \$700 from Rucker. This sum the plaintiff received on July 21, 1902, and on that date credited it as paid on the note now in suit. Cornelius Dorr failed to pay the note in suit on demand at maturity, and the note has remained unpaid except to the amount of \$700 collected on the Rucker note.

It was agreed that if on the facts stated the plaintiff was entitled to recover, judgment might be entered for the plaintiff in the sum of \$1,800, with interest on the sum of \$2,500 at the rate of six per cent per annum from January 10, 1897, to July 21, 1902, and interest on \$1,800 at the same rate from January 21, 1902, to the date of judgment. If the obligation of the



defendant on the note in suit was discharged by any of the acts of the plaintiff judgment was to be entered for the defendant.

*E. D. Sibley*, for the defendant.

*W. E. Hutchins & H. I. Cummings*, for the plaintiff.

BRALEY, J. If the defendant as one of the makers of the note was jointly and severally liable for its payment, yet it was open to him by way of defence to prove that between the debtors themselves he was a surety, and as this relation fully appears in the body of the instrument, the plaintiff was charged with notice of the fact. *Fitchburg Savings Bank v. Torrey*, 134 Mass. 239.

The note is in the ordinary form without any recitals to show that its payment was secured, and when it was delivered originally there does not appear to have been any agreement to which the defendant was a party that security was to be given for its payment. As the pledge made by the co-surety was either voluntary, or at least without any understanding with the defendant, the course pursued subsequently by the plaintiff in dealing with the collateral cannot be treated as an alteration of the original contract which in itself operated to discharge him. *Cambridge Savings Bank v. Hyde*, 131 Mass. 77, 79. *Sanderson v. Aston*, L. R. 6 Ex. 73.

By virtue of his suretyship, and not because of his contract, upon paying the note he would have been subrogated to the rights of the plaintiff in any securities pledged to secure its payment, though, as in this case, furnished by a co-surety. *Guild v. Butler*, 127 Mass. 386. *Duncan v. North & South Wales Bank*, 6 App. Cas. 1, 19.

But as the equitable right on which this defence rests either at law or in equity is, that a surety shall not lose the benefit of any security held by the creditor if at any time he chooses to pay the debt, this indemnity does not extend beyond the actual damage he may be found to have suffered. *Worcester Mechanics' Savings Bank v. Thayer*, 136 Mass. 459, 462. *Boston Penny Savings Bank v. Bradford*, 131 Mass. 199.

If the plaintiff without his consent surrendered such security, or permitted it to be lost or impaired in value, the defendant would be discharged to the extent of any financial loss he thus is shown to have suffered. *Beacon Trust Co. v. Robbins*, 173 Mass. 261, 272.



The only fact upon which the defendant relies as working his discharge is, that without his knowledge or assent a promissory note of the face value of the principal debt, and held as collateral security for its payment, not having been paid at maturity, was surrendered by the plaintiff with the assent of the co-surety, who was the payee and pledgor, and a renewal note for a similar amount taken in substitution.

Beyond the mere recital of the taking of one note in place of the other, the agreed facts contain no statement upon which this defence can be put.

This is significant, for before the defendant can be exonerated from making payment according to his promise it must be made apparent that by the conduct of the plaintiff in accepting the substitution he suffered an actual, and not a speculative injury. *Coates v. Coates*, 33 Beav. 249. *State Bank of Lock Haven v. Smith*, 155 N. Y. 185.

It is not stated that the exchange was made otherwise than in good faith, or that at the time it was not a prudent arrangement entered into for the benefit of all parties in interest.

Neither is it shown that the acceptance of one note for the other resulted in any wrong to the defendant, for the value of the collateral held in either form depended upon the ability of the maker to meet his obligation.

If the original note had been retained, it does not appear that it would have been paid within the time covered by the note taken in renewal, or that during that time the solvency of the maker had become impaired, although later, upon suit being brought, only a portion of the note was collected.

By reason of the absence of any affirmative proof that the plaintiff's action deprived him of a benefit that might have arisen if the collateral note had been retained, the defendant fails upon the agreed facts, under which the case is submitted, to make it manifest that he has suffered any monetary loss, and consequently he is not released. *Coleman v. Lewis*, 183 Mass. 485. *State Bank of Lock Haven v. Smith*, *ubi supra*. *Eaton v. Waite*, 66 Maine, 221. *Bull v. Coe*, 77 Cal. 54, 62. *Merchants Ins. Co. v. Herber*, 68 Minn. 420, 428.

*Judgment affirmed.*



**JOHN E. SEXTON vs. WEST ROXBURY AND ROSLINDALE  
STREET RAILWAY COMPANY.**

Suffolk. January 20, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence. Street Railway.*

One driving an empty coal cart on a narrow dark road after daylight may be found to be in the exercise of due care in driving with one wheel between the rails of a single street railway track at the extreme right hand side of the road to avoid teams coming from the opposite direction although while doing so his cart is struck from behind by an electric car.

A street railway company may be found to be negligent in running an electric car down a slight grade on a track at the extreme right hand side of a narrow dark road after daylight so as to run down from behind an empty coal cart driven partly on its track.

TORT for injuries alleged to have been caused by the negligence of the defendant's servants in running an electric car of the defendant against a coal cart driven by the plaintiff on Oakland Street in that part of Boston called Dorchester on October 12, 1899. Writ dated November 22, 1899.

At the trial in the Superior Court *Pierce, J.* at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*J. M. Maloney*, for the plaintiff.

*D. E. Hall*, (*H. F. Hurlburt* with him,) for the defendant.

LORING, J. We are of opinion that the exceptions in this case must be sustained.

The plaintiff testified that he was run into from behind by an electric car of the defendant, as he was driving home on a dark road, at 7.30 P.M. on October 12. The defendant had a single track on the right hand side of the road facing east, the direction in which the plaintiff was driving. To the right of the track there was no roadway. To the left of it the road was wrought for travel for twelve or fifteen feet. The plaintiff had been hauling coal, and was driving his coal cart home empty. He testified as follows: "You could not see over the wagon to look backwards, unless you stood on your feet on the platform."



He had turned on to the track about three hundred feet east of the place of the collision, and after turning on to it he had driven with his off wheel between the rails of the track and his nigh wheel in the road to the north of the track. The road had a slight down grade. There were woods on both sides of the road. The road was dark; there were kerosene street lamps, but the street was not well lighted; "it was very dark, so that you could not see more than eight or ten feet ahead of you." The plaintiff further testified that he heard no gong or signal; he did hear a buzzing on the wire, and just as soon as he could he tried to turn to the left. The car struck the right hand wheel, and he was thrown into the woods on the right.

*Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104, is a decision requiring the case at bar to be left to the jury unless it make a difference that the accident in that case occurred in daylight. We are of opinion that it does not. It might be thought to be proper for the plaintiff to keep as far to the right as he did in this narrow, dark road, to avoid teams which might come from the opposite direction. It might be found to be negligent for the defendant to run its car down grade through this narrow, dark road, where a person in an ordinary wagon could not see more than eight or ten feet ahead, so as to run down a cart driven partly on its track. With an ordinary headlight and ordinary care on the part of the motor-man, such an accident would be avoided in the absence of special circumstances.

*Exceptions sustained.*



**MARIETTA MCPHEE, administratrix, vs. NEW ENGLAND  
STRUCTURAL COMPANY.**

Suffolk. January 26, 27, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

*Negligence, Employer's liability.*

If a person in charge of a gang of men employed in raising trusses to support a bridge over a canal leading to the second story of a mill building, who also takes part in the work and runs the engine used in hoisting, after sending a workman upon a truss to clear it from the wall of a brick building against which it is jammed in being raised, negligently starts the engine before the truss is clear of the building, and a rope breaks causing the death of one of the workmen, his act in deciding to start the engine may be found to be an act of superintendence although he also does the manual work of setting it in motion.

TORT under the employers' liability act by the administratrix of the estate of John Francis McPhee, who left no widow, the plaintiff being a sister of the intestate and with one Anna J. McPhee his next of kin dependent upon his wages for support at the time of his death, for the conscious suffering and death of the intestate caused in the manner described in the opinion. Writ dated December 27, 1901.

At the trial in the Superior Court before *Richardson, J.* the jury returned verdicts for the plaintiff, one in the sum of \$200 for conscious suffering of the plaintiff's intestate and the other in the sum of \$2,300 for causing the death of the intestate. The defendant alleged exceptions, raising the questions stated by the court.

*W. I. Badger & W. H. Hitchcock*, for the defendant.

*J. E. Macy*, for the plaintiff.

LORING, J. This action was left to the jury on the second count of the declaration. That was a count under the employers' liability act, for negligence of a superintendent. The jury found for the plaintiff, and the case is here on a refusal to direct a verdict for the defendant and to rule that the act of one Cairns in starting the engine (the cause of the accident) was not an act of superintendence.



The defendant was engaged in raising and placing in position a bridge across a canal, one end of which was to enter the second story of a mill building. The work was in charge of a man named Cairns. Cairns not only acted as superintendent, but in addition took part in the work and ran the engine used in hoisting. Beside and under Cairns were four men, and among them the plaintiff's intestate Frank McPhee.

The bridge consisted of six skeleton trusses some ninety feet in length and weighing about five thousand pounds each. Five of them had been placed in position before the accident here complained of happened. That accident happened while the sixth truss was being hoisted to be put in position. The truss in question was being hoisted by means of two gin poles and an engine. Each gin pole was from forty to fifty feet in length, and was held in position by stays from the top of the poles to the ground. These gin poles were about sixty feet apart, and equidistant from the ends of the truss. Attached to each gin pole was a fall, consisting of a double block attached to the top of the poles and a single block attached to one end of the truss, and the end of each fall was connected with a drum of an engine. This engine was behind a fence parallel with the building. There was a gateway in this fence. When the truss in question was lying on the ground, before the hoisting of it was begun, one end lay in the gateway and the other end projected into a large doorway of the mill building through which freight cars ran. This fence prevented the person who was running the engine from seeing the truss until it was raised above the fence.

The falls had been attached to the truss and it had been raised so that the outer end was high enough and the building end not quite so high, before the accident complained of happened. The building end of the truss had first stuck in the doorway, and after it was drawn clear of that it jammed against the wall of the building above the doorway. The hoisting was then stopped, and an effort was made to pull it away from the building by a runner which ran to the "nigger head" of the engine, in substance a third drum. This was not successful, and McPhee mounted that end of the truss, apparently with a crowbar, to clear the end of the truss from the building. Cairns testified that McPhee shouted that the end was clear, and to start



the engine; that he did so, but the drum would not move. Thereupon he went out and called to McPhee that the end must be still foul of the building, to which McPhee answered that it was not, and to go ahead; whereupon he went back, put on an extra strain, the engine made a few revolutions, and the rope broke, causing the injuries here complained of from which McPhee died.

If the jury believed the story told by Cairns, the defendant was entitled to a verdict as matter of law.

But the jury were not bound to believe that story. One of the gang, Hatcher by name, (who was tending a tackle running from the middle of the truss to a footbridge near by to keep the truss from buckling,) testified that he did not hear any signals to stop or to go ahead just previous to the truss falling. Another of the gang, Hanlon by name, (who at the time of the accident was tending another line attached to the middle of the truss, to keep it from buckling, which line had been tended by McPhee before he mounted the building end of the truss,) testified to the same effect. The third man, Kehoe, who was stationed to prevent the outer end of the truss from fouling the bent on which it was to rest, testified to the same effect. The jury were warranted in finding that Cairns did not start the engine on a statement from McPhee that the truss was clear of the building, and that he was negligent in starting the engine when he did.

It also is plain that the jury could find that McPhee was in the exercise of due care.

This brings us to what is really the only question in the case, namely, whether the act of Cairns in starting the engine was an act of superintendence.

The negligence, if there was negligence in starting the engine, consisted in causing the engine to be started at all under the circumstances then existing, namely, when the truss was jammed against the wall, and when something had to give way if the engine was set in motion then.

This is not a case where it was proper to start the engine, and there was negligence in the way in which the starting of the engine was carried into effect.

In the former case, the decision that the engine shall be started is an act of superintendence, and it is none the less so



because the manual work of setting the engine in motion is done by the superintendent. The cases of *O'Brien v. Look*, 171 Mass. 36, *Roche v. Lowell Bleachery*, 181 Mass. 480, *Meagher v. Crawford Laundry Machinery Co.* 187 Mass. 586, are cases belonging to this class.

In the latter case the act of negligence is in the way the engine is set in motion it being proper to set it in motion at the time. That is not an act of superintendence, but is an act of a fellow servant, and for that the master is not liable at common law or under the employers' liability act. The cases of *Cashman v. Chase*, 156 Mass. 342, *Riou v. Rockport Granite Co.* 171 Mass. 162, *Flynn v. Boston Electric Light Co.* 171 Mass. 395, *Joseph v. Whitney Co.* 177 Mass. 176, *Hoffman v. Holt*, 186 Mass. 572, are cases belonging to this class. It was held in *Whittaker v. Bent*, 167 Mass. 588, that when the superintendent in that case said "go ahead," those words were said in the course of his work as a fellow servant, not as a direction given by him as a superintendent, and for that reason that case comes within this class. *Brittain v. West End Street Railway*, 168 Mass. 10, was held to come within this class.

*Exceptions overruled.*

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JOHN S. TODD vs. ALVAN D. MACLEOD.

Norfolk. January 27, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

*Practice, Civil, Exceptions.*

Where by a bill of exceptions it appears that at the close of the plaintiff's evidence the judge refused to rule that the plaintiff could not recover except for certain items admitted to be due, that thereupon the trial proceeded and the defendant put in his evidence, and that upon the whole evidence the judge found for the plaintiff for the entire sum claimed, an exception by the defendant to the judge's ruling cannot be sustained, whether the ruling was correct or not, for the plaintiff's case if originally insufficient may have been completed by the evidence put in by the defendant so as to justify the finding on all the evidence.

LORING, J. This is a petition to enforce a mechanic's lien. The petitioner was under a contract with one Boyden to do the



tinning, gas fitting and plumbing on a house which was being built by Boyden. The petitioner stopped work in August, took away part of his tools then, and in September took away the rest of them. On October 28, he put in a length of brass tube in place of one which was defective, adjusted the valves in the tanks and turned on the water. He testified that he did this work at the request of one Jameson, who was the agent of the respondent (the respondent apparently bought the house of Boyden) and was not the agent in any way for Boyden. The petitioner also testified that Jameson told him he was the agent of the respondent and he asked him (the plaintiff), in behalf of the tenant, to go and fix the leak to keep the tenant from moving out.

The bill of exceptions ends as follows: "At the end of the petitioner's evidence the respondent requested the court to rule that the petitioner could not recover except for the October items, which items the respondent admitted were owed by him (this work being ordered by him directly and which he claimed was not a part of the original contract). The ruling was refused, an exception was duly taken by the respondent, and allowed; the trial of the case thereupon proceeded, the respondent put in his defence, and upon the whole evidence a finding was made for the entire sum claimed by the petitioner. By reason of the aforesaid rulings and refusal to rule, the respondent was aggrieved and duly excepted, and prays that his exceptions may be allowed."

It is not entirely clear whether the bill of exceptions is not to be taken to state that the presiding judge refused the ruling asked for because he refused to make any ruling on the sufficiency of the petitioner's evidence unless the respondent rested his case on that evidence, as to which see *Goss v. Calkins*, 162 Mass. 492; *Wild v. Boston & Maine Railroad*, 171 Mass. 245. But passing that by, the difficulty is that we do not know what evidence was put in by the respondent. The statement in the bill of exceptions is that after the ruling on the sufficiency of the petitioner's evidence "the trial of the case thereupon proceeded, the respondent put in his defence, and upon the whole evidence" a finding was made for the petitioner. How can we say that the evidence subsequently put in by the respondent did not make plain what was doubtful on the petitioner's evidence?



In that case the respondent was not injured by this ruling on the sufficiency of the petitioner's evidence, if it was wrong.

The case comes within the rule that the exceptions must show error, and an exception to a ruling as to the sufficiency of evidence which does not state that the evidence ruled upon was all the evidence on the point will not be sustained, even if so far as appears it was erroneous. *Monaghan v. Goddard*, 173 Mass. 468.

*Exceptions overruled.*

*E. S. Spalding* for the respondent.

*W. S. Pinkham*, for the petitioner.

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JOHN J. COUSINS vs. MARY E. O'BRIEN, executrix (substituted on suggestion of death of original defendant).

Suffolk. January 27, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

*Attachment, Of mortgaged personal property. Officer. Conversion.*

If a mortgagee of personal property which has been attached on a writ against the mortgagor before default, in attempting to make a demand on the attaching officer under Pub. Sts. c. 161, § 75, in good faith demands an amount largely in excess of the amount due by inadvertently naming the amount of the mortgage note instead of the sum of money actually advanced upon it, and if the mortgagee does not show that the attaching creditor was not prejudiced by the over-stating of the amount demanded, the demand is void and the attachment is good against the mortgage.

Where a mortgagee of personal property which has been attached on a writ against the mortgagor, who subsequently becomes insolvent, has failed to take any steps toward foreclosing his mortgage for a breach of condition by the mortgagor in allowing the property to be attached, and has made no valid demand on the attaching officer for the payment of the debt secured by his mortgage, a delivery of the property by the attaching officer to the assignee in insolvency of the mortgagor does not constitute a conversion of the property or give the mortgagee any right of action against the officer.

BRALEY, J. This is an action of tort brought against John B. O'Brien, late sheriff of Suffolk County, for the alleged wrongful act by one of his deputies in attaching and holding on a writ against the mortgagors certain personal property on



which the plaintiff had a valid mortgage to secure the payment of a promissory note made by them. The sheriff having died pending the suit, his executrix duly appeared and took upon herself the defence of the action.

In the Superior Court the case was referred to an auditor, whose report was treated by the parties as an agreed statement of facts, on which, judgment having been rendered for the plaintiff, the defendant appealed to this court.

At the time of the attachment the property, consisting of a stock of boots and shoes, together with the furniture used in the store and office, was subject to a mortgage to the plaintiff to secure the payment of a promissory note for \$3,000, on which there had been advanced to the mortgagors the sum of \$725. Upon being informed of the attachment the plaintiff consulted counsel as to his legal rights, and a written demand, proper in form, was prepared, and duly served on the deputy sheriff. By a mistake, which is found to have been inadvertently made, the sum demanded was for the face of the note instead of the amount that had been advanced. This demand was not complied with, and, upon the mortgagors being duly declared insolvent debtors, the property was surrendered by the attaching officer to their assignee, by whom it was afterwards sold at public auction for \$1,548.10.

It is the contention of the plaintiff either that the failure to deliver the mortgaged property to him when demanded, or its subsequent delivery to the assignee, constituted a conversion which entitles him to recover its value.

The provisions of the Pub. Sts. c. 161, § 75, which were in force at that time and have been re-enacted in substance in R. L. c. 167, § 70, required that a just and true account of the debt due should be set forth in the demand, otherwise it is insufficient to work a dissolution of the attachment, or render the officer liable to the mortgagee for the market value of the mortgaged property.

As the claim made by the plaintiff was largely in excess of the money due to him, he seeks to avoid the letter of the statutory requirement on the ground that he had no intention to deceive, and intended to state his true debt.

While the auditor so finds, there is no further finding made



by him that although this mistake was inadvertently made the attaching creditor was not prejudiced.

It was said in *Campbell v. Eastman*, 170 Mass. 523, 524, by Knowlton, J.: "The words, 'state in writing a just and true account,' indicate a purpose on the part of the Legislature to secure for the attaching creditor definite and particular information. The cases have construed the statute liberally in favor of mortgagees who have made innocent mistakes in attempting to state accounts, but the general purpose of the requirement to give the creditor definite and valuable information is obvious."

The value of the property attached, as shown by its subsequent sale, was apparently much more than the actual amount due, and if an erroneous statement had not been made, the creditor might have elected to pay the claim and retain the property, and it cannot, therefore, be said that he was not misled to his pecuniary loss, and the plaintiff cannot be relieved from the consequences of a misleading demand. *Wilson v. Crooker*, 145 Mass. 571, 573, and cases cited. *Hanly v. Davis*, 170 Mass. 517. *Campbell v. Eastman*, *ubi supra*.

By the terms of the mortgage, there having been no default, the mortgagors were entitled to the exclusive possession of the property, and this case is not governed by *Howe v. Bartlett*, 1 Allen, 29; *S. C.* 8 Allen, 20, where the property attached was in the possession of the mortgagee, or by *Ring v. Neale*, 114 Mass. 111, where the mortgage under consideration was not shown to have contained a similar clause, but in this respect it falls within the cases of *Field v. Roosa*, 159 Mass. 128, 131; *Field v. Early*, 167 Mass. 449, 450.

A further argument is advanced by the plaintiff that as the mortgagors permitted the property to be attached in violation of one of its conditions, this breach gave the plaintiff the immediate right to possession. But while this is true, the original attachment was lawful, and remained in force by reason of the insufficient demand until dissolved by the assignment. *Wing v. Bishop*, 9 Gray, 223. *Woodward v. Ham*, 140 Mass. 154. And if the plaintiff had then demanded the property, and instead of delivering it to him the officer turned it over to the assignee, he might have been liable for its unlawful detention and conver-



sion. *Edmunds v. Hill*, 133 Mass. 445. *Citizens' National Bank v. Oldham*, 136 Mass. 515.

No steps, however, were taken by him to foreclose his mortgage, and he failed to make any demand. A delivery of the property to the assignee, under these circumstances, was not sufficient to constitute a conversion, or give to the plaintiff a cause of action against the officer. Pub. Sts. c. 161, § 75. *Grant v. Barnes*, 177 Mass. 111, 113.

*Judgment for the defendant.*

*W. F. Kimball*, for the defendant.

*B. S. Ladd & T. F. Strange*, for the plaintiff.

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SEMAN KLOUS vs. COMMONWEALTH.

Norfolk. March 9, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Damages. Evidence, Opinion: expert. Witness.*

On a petition for damages from the taking of the petitioner's land on a bank of a river by the metropolitan park commissioners under St. 1893, c. 407, and St. 1895, c. 450, if the instrument of taking expressly excepts all rights to take and use the waters of the river for mechanical or manufacturing purposes and rights of flowage, "as well as the right to keep up, maintain, reconstruct, alter and use any water mill, mill privilege, canal, flume, raceway, mill dam, or flash boards, now lawfully existing or used, together with the right to enter upon the reservation" established by the taking, "so far as necessary to the use and enjoyment of the rights herein excepted," the petitioner is entitled to no damages for the loss of any right to use the land incident to the use of the waters, all such rights being included in the exception whether the structures necessary for such use existed at the time of the taking or not, the taking also excepting all existing structures even though they might not be necessary for the best use of the water in the way it was being used.

On the issue of the value of land at Hyde Park on a bank of the Neponset River taken by the metropolitan park commissioners under St. 1893, c. 407, and St. 1895, c. 450, it is within the discretion of the presiding judge to refuse to allow a witness who never had lived in Hyde Park or bought or sold property there and was not shown to have special knowledge of values there, to testify as an expert as to the amount of the damage to the petitioner, although the witness was in the real estate business in Boston and had had experience as a civil engineer and as a builder and repairer of textile mills, and at one time had charge of a mill in New Hampshire and of another at Lawrence, was the owner



of a manufacturing site in Everett, had built and sold a chemical factory at Newton Upper Falls on the Charles River, and had some knowledge as to the general value of manufacturing property. Especially is such discretionary exclusion justified where the witness's testimony already given had shown that his opinion on the question of damages probably was affected by an erroneous view of the rights of the parties.

PETITION, filed September 24, 1900, by the owner of land on the northerly bank of the Neponset River in the town of Hyde Park near the River Street station on the midland division of the New York, New Haven, and Hartford Railroad Company, taken on December 20, 1899, by the metropolitan park commissioners under St. 1893, c. 407, and St. 1895, c. 450.

In the Superior Court the case was tried before *Pierce, J.* After the witness Joseph Stone had given the testimony referred to in the opinion, the petitioner offered to show by him that the entire damage caused by the taking was \$70,000, but the judge ruled that the witness was not qualified as an expert, and excluded the evidence.

At the close of the evidence the petitioner requested the following rulings: 1. The petitioner is not now entitled to all the rights of a riparian owner in and to the waters of the Neponset River. 2. The petitioner now has no right to take water from the Neponset River through a canal or trench not now existing, which right he possessed before the taking. 3. The petitioner has no right to build or maintain a filter well or gallery not now in existence on the land taken in order to take the water from the river by filtration. 4. The petitioner has no right to take water from the Neponset River in any different way than that in which it has been taken by him before the taking. 5. The petitioner has no right to drain water from the remaining portion of his land not taken by the Commonwealth, over the surface of the land taken by the Commonwealth, to the river. 6. The petitioner has no right to cause water, taken from the river and used on the remaining portion of his land, to flow back to the river by a canal or trench not now existing through the land taken.

The judge refused to make any of these rulings, and instructed the jury among other things that the metropolitan park commissioners have nothing whatever to do with the regulation of waters, which expressly were excluded from their taking.

The jury returned a verdict for the petitioner in the sum of



\$9,290.40, which was much less than he claimed; and the petitioner alleged exceptions.

*J. E. Cotter & J. P. Fagan*, for the petitioner.

*R. G. Dodge*, Assistant Attorney General, (*A. Marshall* with him,) for the Commonwealth.

KNOWLTON, C. J. This case presents two questions: one relates to the construction of the exception in the instrument of taking, and the other to the competency of a witness, offered as an expert, to give his opinion upon the amount of damages caused by the taking of the petitioner's land for a public park.

This land is in Hyde Park, on the northerly bank of the Neponset River, a part of it being on the side and a part in the bed of the stream. The instrument of taking contains an exception as follows: "Expressly excepting, however, from the foregoing descriptions and from the operation of the taking hereby made, and for the use and benefit of the persons or corporations lawfully entitled to the rights and privileges hereinafter mentioned, and their respective heirs, successors and assigns, all lawful rights to take or use the waters of said Neponset River, or the power derived therefrom, for any mechanical or manufacturing purposes, also all lawful rights of flowage, as well as the right to keep up, maintain, reconstruct, alter and use any water mill, mill privilege, canal, flume, raceway, mill dam or flash boards, now lawfully existing or used; together with the right to enter upon the reservation hereby established so far as necessary to the use and enjoyment of the rights herein excepted." The taking included lands of different owners along the river.

The first part of this exception, ending with the word "flowage," leaves out of the property taken and secures to the owners in the amplest way, for mechanical or manufacturing purposes, all water rights belonging to the property a part of which is taken. *Tyler v. Hudson*, 147 Mass. 609. *Conness v. Commonwealth*, 184 Mass. 541. This, with the right to enter upon the land taken, includes all uses of the land necessarily incident to the use of the water. The jury were instructed accordingly, and if the exception contains no limitation of these rights, there is no ground of objection to the charge.

The petitioner contends that the right to maintain and reconstruct any of the structures mentioned "now lawfully existing or



used" limits the right to use the water to the methods which previously had been adopted. We do not so interpret the language. We are of opinion that it was intended to secure the right to maintain the existing structures mentioned, even though they might not be necessary for the best use of the water in the way that the owner was using it. It is quite conceivable that there might be such structures which were not well adapted to the proper appropriation of the water, and this provision secures to the owners the right to maintain them. It cannot properly be construed as a limitation of the right to use the water secured in other parts of the exception without mention of the structures to be employed.

The witness Stone was allowed to testify as an expert upon all matters as to which he had special knowledge, unless it be held that he had special knowledge of the amount in money necessary to compensate the petitioner for the property taken. He never had lived in Hyde Park, or bought or sold property there, and there was nothing to show that he had special knowledge of values there. He was in the real estate business in Boston, and he had had experience as a civil engineer and as a builder and repairer of textile mills. He had charge at one time of the Manchester mills in Manchester, New Hampshire, and afterwards of the lower Pacific mills at Lawrence. He was also the owner of a manufacturing site in Everett, and he had built and sold a chemical factory at Newton Upper Falls on the Charles River, and he had some knowledge as to the general value of manufacturing property. We are of opinion that it was within the discretion of the court, in view of all the facts of the case, to admit or exclude his opinion as to the amount of damages. The rules to be applied to such offers were discussed in *Conness v. Commonwealth*, 184 Mass. 541, as well as in the earlier case of *Cochrane v. Commonwealth*, 175 Mass. 299. See also *Lakeside Manuf. Co. v. Worcester*, 186 Mass. 552, 560. The witness testified that in his opinion "the park commissioners might cut off the water or restrict the use of the water or the manner of getting it or the times of getting it." Presumably his opinion on the question of damages was affected by this view of the rights of the parties, which was contrary to the law as laid down by the court. There was no error in the exclusion of the testimony.

*Exceptions overruled.*



## ANNIE FALKINS vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 13, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Negligence. Elevated Railway Company.*

It is not the duty of an elevated railway company operating trains through a subway to warn persons about to pass from one car to another at a station in the subway that there is danger of stepping into the opening between the cars.

TORT, by a woman twenty-three years old, for injuries received on August 1, 1901, about 10.15 A. M., from her left leg going down into the space between two cars of the defendant, stopping at the Park Street station in the subway in Boston, when the plaintiff had started to pass from one car to the other after a guard of the defendant had called out "This is a smoker; pass through." Writ dated April 10, 1902.

In the Superior Court the case was tried before *Holmes, J.* At the close of the evidence the defendant requested the following rulings, with others which were given by the judge:

"1. Upon all the evidence in the case the plaintiff is not entitled to recover.

"2. Upon all the evidence in the case it does not appear that the plaintiff was in the exercise of due care.

"3. There is no evidence that the defendant was negligent."

"11. It was not negligence on the part of the defendant to so construct its car platforms that there was a space of from seven and a half to ten inches between the cars.

"12. It was not negligence on the part of the defendant to permit passengers to pass from one car to another while the train was at a standstill.

"13. If the jury find that the guard of the defendant directed the plaintiff to cross from one car to another, that, in itself, would not constitute negligence.

"14. There is no duty upon the defendant to notify passengers who are crossing from one car to another while the train is at a standstill of the existence of the space between the cars."



The judge refused to give the rulings quoted, and instructed the jury in substance on these points, that the burden was on the plaintiff to prove due care on her part and negligence of the defendant, that the jury were to decide whether or not under all the circumstances of the case the plaintiff was in the exercise of due care, and, if they found that she was, they were to decide whether under all the circumstances there was anything in the conduct of the guard which was negligent.

The judge further said: "You have heard the testimony about the space. You have heard the testimony of what took place. Has the plaintiff satisfied you that the defendant was negligent? In the first place was that a space such that a person could not use it — a person of ordinary prudence could not use it — for passage without getting hurt? Was it a dangerous place? Was it unreasonable and negligent on the part of the railroad company to permit people to use and pass from one car to the other with that space there without warning them and cautioning them?"

The jury returned a verdict for the plaintiff in the sum of \$2,000; and the defendant alleged exceptions.

*H. Bancroft*, for the defendant.

*O. Storer*, for the plaintiff.

KNOWLTON, C. J. Since the trial in this case before a jury, the exceptions in *Welch v. Boston Elevated Railway*, 187 Mass. 118, have been considered by this court and a decision announced which covers substantially all the questions raised at this trial.

The plaintiff was injured by stepping down in the space between two cars of a train on the elevated railway, while passing from one car to another at a station. These cars run upon an elevated track through much of their course, and they also pass through the subway and run around sharp curves and on steep grades which were made necessary by the location and construction of the subway and the connecting roads. The cars were coupled together so that in the centre of the passageway from car to car, there was an open space seven and one half inches wide and the platforms of the cars curved away to permit the train to go around the curves, so that on the sides of the passageway the space between the cars was ten and one half inches



wide. The uncontradicted evidence tended to show that it was necessary to have this space between the cars, because the grades of the defendant's road were heavier and the curves sharper in portions of the subway than on any other elevated system. The defendant has no responsibility for the mode of construction of its subway, which was built under legislative authority as a great public work, by the city of Boston, and afterwards leased to the defendant. There was no evidence tending to show that there was any other practicable mode of construction of the cars, which would have been safer and better.

The jury were instructed rightly that there was no evidence of negligence on the part of the defendant in the construction of its cars and car platforms; but they were allowed to find that it was negligence for the defendant to permit passengers to pass from one car to another, without warning them of the danger of stepping into the open space. This subject was covered by the decision in *Welch v. Boston Elevated Railway*, *ubi supra*. In that case as in this, it appeared that the chains which were kept up at the end of each car while the train was in motion, were taken down at the station, thereby extending an invitation to passengers to pass from one car to another if there was occasion so to do, and in the earlier case it appeared that the plaintiff, a woman, after taking a step or two into a car, discovered that it was a smoking car and turned to pass across the platforms into the next car and stepped down between the cars. Neither she nor the plaintiff in the present case was given any warning. The only difference between that case and this, as the present plaintiff presents it, is that in that the plaintiff herself discovered that she had entered the smoking car and started to pass into the other; while the present plaintiff says that the guard on the platform called out, "This is a smoker; pass through." This difference is immaterial, for the open passageway with the chains down was as much an invitation to a lady who found herself at the door of the smoking car, to pass across into the other car, as were the words of the guard.

The real question is the same in both cases: Whether it was the duty of the defendant to have a man who should warn every passenger who was about to step from one car to another, of the danger of stepping into the opening. We are of opinion that



the law does not impose this duty on the defendant. No one who observes a train of these cars as it enters or leaves a station can fail to see that there is a space between the cars. In passing from one car to another, a person who looks to see where he is stepping must discover the same fact, if he did not know it before. The percentage in number of all the passengers that ride upon these trains who would pass from one car to another without knowing that there was such a space between them, in time to prevent an accident of this kind, is exceedingly small. The practical difficulty of giving to every passenger who is about to pass from car to car an express notice of the opening, which would be any better than the information gained by the use of his eyes, would be great. The annoyance and disturbance that would be caused by speaking to every such passenger would be very objectionable. A majority of the court remain satisfied with the decision in *Welch v. Boston Elevated Railway*, that there was no negligence on the part of the defendant in arranging its passageway for passengers and impliedly inviting them to use it at stations, whenever there is occasion so to do, without informing them in words that there is an open space between the platforms.

*Exceptions sustained.*

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LEMUEL CROSSMAN & another vs. CHARLES A. GRIGGS.

Norfolk. March 14, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Equity Pleading and Practice*, Decree, Amendment. *Practice, Civil*, Amendment, Costs. *Waiver. Attorney.*

An order in a rescript of this court of "Bill dismissed" and a docket entry in the Superior Court in pursuance of it do not constitute a final decree, and the plaintiff thereafter may be allowed by the Superior Court to amend by changing his suit in equity into an action at law.

Where a plaintiff is allowed to amend a suit in equity into an action at law on payment of costs to the defendant by a certain day and the defendant accepts a payment of the costs after the day named and retains the money, and subsequently files a general appearance and answer to the declaration at law, this is a waiver by the defendant of any right to object to the plaintiff's amendment on the ground that the plaintiff did not pay the costs within the time named in the order allowing the amendment.



The attorney for a defendant may make a valid agreement in writing with the attorney for the plaintiff extending the time for the payment of costs which the plaintiff has been ordered to pay as a condition on which he is allowed to amend a suit in equity into an action at law.

BILL IN EQUITY, begun by a writ dated August 30, 1898, to recover certain amounts of money, and also to reach and apply the trade name and good will of the defendant's business to the satisfaction of the plaintiffs' claims.

On December 14, 1903, the Superior Court made a decree, dismissing the plaintiffs' bill with costs to the defendant. From that decree the plaintiffs appealed. On June 27, 1904, this court sent down the following rescript: "Decree of March 8th, 1899, vacated; bill dismissed with costs to the defendant Griggs; exceptions overruled," which was duly entered on the docket of the clerk of the Superior Court on June 27, 1904.

On July 14, 1904, William A. Munroe, Esquire, entered his appearance for the defendant. After certain other proceedings, no further decree having been made, the plaintiffs on July 16, 1904, made a motion to amend from equity to law. On July 21, 1904, *Lawton, J.*, before whom this motion to amend was heard, indorsed the following order on the motion: "Norfolk, ss., Superior Court, Boston, July 21st, 1904. After hearing upon within motion, ordered that said motion be allowed upon the payment into court for the use of the defendant Griggs on or before August 3rd, 1904, the costs to date in accordance with the rescript taxed as in an action at law, and in addition thereto three term fees, otherwise motion is disallowed. By the Court sitting in Boston. Henry E. Bellew, Assistant Clerk."

Messrs. Brandeis, Dunbar and Nutter, counsel for the plaintiffs, and Mr. Munroe, counsel for the defendant, were unable to agree upon the amount of taxable costs. Thereupon Mr. Munroe notified Messrs. Brandeis, Dunbar and Nutter to appear in the equity motion session of the Superior Court for Suffolk County on August 3, 1904, on the question of what costs were properly taxable under the order of *Lawton, J.* On August 3, 1904, George R. Nutter, Esquire, one of the counsel for the plaintiffs, and Albert H. Chamberlain, Esquire, then associated with Mr. Munroe, were present at the equity motion session of the Superior Court for Suffolk County, and Mr. Nutter at that



time informed Mr. Chamberlain that he was prepared in behalf of the plaintiffs to pay the taxable costs in accordance with the order of the judge and was prepared to proceed with the hearing on the amount of the costs. Mr. Chamberlain stated that Mr. Munroe was ill, and requested that the payment be postponed and that the hearing on the question of the costs be continued to August 5, 1904. Thereupon on August 3, 1904, the following agreement in writing was entered into by Mr. Nutter in behalf of Brandeis, Dunbar and Nutter, counsel for the plaintiffs, by Mr. Chamberlain in behalf of Mr. Munroe, counsel for the defendant: "Commonwealth of Massachusetts. Norfolk, ss. Superior Court in Equity. Lemuel Crossman *et al.* vs. Chas. A. Griggs. In the above entitled cause it is agreed that the time for the plaintiffs to pay the costs as provided in the order allowing the plaintiffs to amend the bill into an action at law may be extended to and including Friday, August 5, 1904. Brandeis, Dunbar and Nutter, Attys. for Plaintiffs, William A. Munroe, Atty. for Griggs." The defendant had no knowledge of this extension of time and neither assented nor dissented. On August 5, 1904, there was a hearing before *Fessenden, J.*, in the equity motion session for Suffolk County on the amount of taxable costs, at which hearing Mr. Nutter appeared in behalf of the plaintiffs, and Mr. Munroe in behalf of the defendant, and the taxable costs then determined by the court were on that day, August 5, 1904, paid to the counsel for the defendant in behalf of the plaintiffs. This agreement was not presented to the court for allowance. It was filed with the clerk on August 5, 1904, on which day the costs, amounting to \$212.38, actually were paid as appears of record. The defendant still retains the costs so paid, and never has offered to return them or any part thereof to the plaintiffs.

On August 20, 1904, Mr. Munroe, having withdrawn his appearance for the defendant, and Vere Goldthwaite, Esquire, who had entered his appearance for the defendant on August 19, 1904, and who had been absent in California at the time of the proceedings to amend into law, having returned from California, entered a general appearance and an answer to the plaintiffs' declaration in behalf of the defendant without actual knowledge of all of the terms of the order of the court dated July 21, 1904,



allowing conditionally the amendment into law, although Mr. Goldthwaite knew that some order had been made allowing amendment into law. Later Mr. Goldthwaite, having learned of the terms of the order, on October 17, filed a motion to dismiss the action at law and a motion for a final decree.

On November 4, 1904, the defendant's motion to dismiss the action at law and to enter a final decree were argued together before *Bell, J.*, and the defendant thereupon asked the judge to rule in substance as follows :

"First. That the entry on the docket of this court made by the clerk on the 27th day of June, 1904, to wit: the entry of 'Decree of March 8th, 1899, vacated; bill dismissed with costs to the defendant Griggs; exceptions overruled,' was itself, under all the circumstances of this case, a final decree and a final adjudication of this cause.

"Second. That, because the decree of this court made July 21, 1904, was not, as appears by the record, complied with, this court now has no power to entertain any further proceedings with respect to said cause except a motion for a final decree in more extended form, which motion and decree in more extended form is before it for allowance.

"Third. That the order of this court dated July 21, 1904, as appears of record, to wit: 'Plff's motion to amend from equity to law allowed upon payment into court for use of deft. Griggs on or before August 3rd, 1904, costs to date in accordance with rescript taxed as an action at law and in addition thereto three term fees, otherwise motion is disallowed,' was an order upon an express condition, to wit: upon the condition of the payment into court for the use of the defendant Griggs on or before August 3rd, 1904, costs (as set forth in said order) that said costs were not paid into court on or before August 3rd, 1904, as appears of record, and that therefore the motion to amend was disallowed and the plaintiffs have no action at law now pending against the defendant before this court; or if they have, it be dismissed for the reasons above stated and the final decree allowed.

"Fourth. That the record of this court cannot be changed by an agreement of the parties or their attorneys, as undertaken in this case, without an order of court.



"Fifth. That the general appearance, answer and other proceedings taken by the defendant in this case since August 3, 1904, do not have the effect to estop the defendant from any proceedings which might have been had by him in the premises after the entry of the rescript from the full court.

"Sixth. That because the order of court referred to in the third request for rulings of the defendant was not complied with, the case now stands as if the plaintiffs' motion to amend from equity to law had never been made."

The judge refused to make any of these rulings and the defendant excepted. The case then being before the judge upon its merits, the defendant offered no evidence to disprove the plaintiffs' claims for the several amounts set out in the declaration, with the exception of the sum of \$400 for use and occupation contained in the seventh clause thereof, which the plaintiffs waived, but the defendant asked the judge to rule:

"Seventh. That the various issues joined in this case have each and all been adjudicated, as appears of record in this court, and that there must be a judgment for the defendant.

"Eighth. That if there is an action of law now pending against the defendant in the premises, the cause thereof happened more than six years before the commencing of said action at law as appears of record in this court, and is therefore barred by the statute of limitations, and there must be judgment for the defendant."

The judge refused to rule as requested. He found for the plaintiffs, at first in the sum of \$28,949.88 which he subsequently reduced to \$24,516.26, the amount of the *ad damnum* of the writ being \$25,000. See *Crossman v. Griggs*, *post*, 217. The defendant alleged exceptions.

*V. Goldthwaite*, for the defendant.

*J. B. Studley*, (*G. R. Nutter* with him,) for the plaintiffs.

KNOWLTON, C. J. The rescript "Bill dismissed," and the docket entry in pursuance of it, were not a final decree which precluded further action in the case. The court had power to allow an amendment changing the suit in equity into an action at law. This was expressly decided after full consideration in a similar case. *Merrill v. Beckwith*, 168 Mass. 72.

The order authorizing the amendment was complied with.



Under the circumstances, the fact that the payment of costs was not made on the day mentioned in the order is immaterial. The defendant, on August 5, 1904, having knowledge by his attorney of all the facts, accepted the costs, the payment of which was made the condition of allowing the amendment, and he still retains them. Whether he had personal knowledge or not, he is bound by the knowledge of his attorney. *Sartwell v. North*, 144 Mass. 188. Afterwards he filed a general appearance and an answer to the declaration at law. This conduct in itself ought to be held a waiver of his right to object that the original condition stated in the order was not complied with literally.

The condition as to payment of costs at the prescribed time was for the benefit of the defendant, and he might waive it by an extension of the time, or otherwise. A valid agreement in writing for an extension of the time was made by the attorneys of the parties and subsequently filed with the papers in the case. There is express statutory authority for similar agreements in the R. L. c. 173, §§ 69, 70. See also *Wieland v. White*, 109 Mass. 392; *Moulton v. Bowker*, 115 Mass. 36; *Shattuck v. Bill*, 142 Mass. 56.

*Exceptions overruled.*

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ALBERT J. WOOD vs. BOSTON ELEVATED RAILWAY  
COMPANY.

Suffolk. March 21, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Negligence, In driving. Street Railway.*

In an action by the driver of a loaded furniture wagon against a street railway company for injuries caused by his team being run into from behind by a car of the defendant, if it appears that the plaintiff was driving on the left hand side of a street and, being obliged to cross the defendant's tracks to get to his destination, leaned out of his wagon, looked back and saw a car approaching about three hundred or three hundred and fifty feet away, and thereupon, judging it safe to turn his horses across the track, did so and almost immediately his team was struck by the car, which broke the pole and whiffletree and twisted the wagon around, throwing the plaintiff out, and then went two or three lengths beyond, having sounded no gong as it approached, there is evidence that the plaintiff was in the exercise of due care and that the defendant was negligent.



TORT by the driver of a furniture wagon against a street railway company for injuries caused by his team when loaded with furniture being run into by an electric car of the defendant on Elm Street at or near Cutter Square in Somerville after daylight on December 6, 1900. Writ dated March 26, 1902.

At the trial in the Superior Court before *Sherman, J.* the jury returned a verdict for the plaintiff in the sum of \$2,075; and the judge at the request of the defendant reported the case for determination by this court upon the terms stated in the opinion.

*J. F. Sweeney & A. A. Capotosto*, for the defendant.

*M. I.-F. Reuben*, for the plaintiff, was not called upon.

MORTON, J. This is an action of tort to recover for injuries sustained by the plaintiff in consequence of a collision of one of the defendant's cars with a team which the plaintiff was driving whereby he was thrown off and injured. At the close of the evidence the defendant requested the judge to order a verdict for the defendant which the judge declined to do but submitted the case to the jury which returned a verdict for the plaintiff. The case is here on report. If judgment should have been ordered for the defendant it is to be so entered, otherwise judgment is to be entered on the verdict.

The questions are the usual ones of due care on the part of the plaintiff and negligence on the part of the defendant. We do not see how it could have been ruled as matter of law that the plaintiff was not in the exercise of due care, or that there was no evidence of negligence on the part of the defendant. The plaintiff was on the left hand side of the road and turned to cross the defendant's tracks as it was necessary that he should do in order to go in the direction in which he wanted to go. Before attempting to cross he leaned out of his team and looked back and saw a car approaching about three hundred or three hundred and fifty feet away. Judging it safe to do so he turned the horses to cross the track and almost immediately the team was struck by the car just behind the forward off wheel and he was thrown off. The plaintiff was not negligent as matter of law in being on the left hand side of the street, (*Galbraith v. West End Street Railway*, 165 Mass. 572,) and the question whether taking all the circumstances into account he was in the



exercise of due care was eminently a question for the jury. So too was the question whether the motorman was negligent, and whether the collision was due to his carelessness. The testimony as to the speed of the car was conflicting; some of the witnesses testifying that it was going at a good rate of speed and the testimony tending to show that the team was twisted round and that the car went two or three lengths after striking the team and that the pole and whiffletree were broken by the force of the collision. There also was testimony tending to show that the gong was not sounded, and that the street was well lighted and that the team was plainly visible. These and other circumstances, including the possible condition of the motorman, rendered it impossible to order a verdict for the defendant as requested.

*Exceptions overruled.*

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HENRY N. SAWYER vs. GEORGE M. COOK & another.

GEORGE M. COOK & another vs. HENRY N. SAWYER.

Suffolk. March 30, 1905. — May 18, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Trust, Creation. Equity Jurisdiction, Laches, To remove cloud on title.*

Where one of three owners in common of a tract of land, bought to be cut into lots to be put upon the market, conveys his share in fee to the other two for convenience in managing the property and making conveyances, the parties making an agreement in writing by which all three are to use their best skill and exertions in making sales of the land and the one conveying his title is to receive from those holding the title a certain proportion of the proceeds from sales after the payment of all indebtedness and expenses, an express trust is created although the word "trust" is not used.

Where three persons have bought land in common for the purpose of cutting it into lots and putting it upon the market, and, for convenience in managing the property and making conveyances, one of the owners in common conveys his share in fee to the other two, retaining an equitable interest under an agreement in writing by which all three agree to "make use of their best skill and exertions to make sale of said real estate", if after the lapse of a year the one who has conveyed his share, instead of contributing his services to the development of the undertaking, voluntarily ceases to participate in it and makes an assignment of his interest through a third person to his wife, goes into bankruptcy, and shortly thereafter removes from the Commonwealth and for twenty-nine



years fails to make any exertions, or interest himself in any manner in making sales of the land, he has lost his equitable rights by laches, so that after this lapse of time his assignee cannot enforce the original trust created by the agreement in writing or compel an accounting by the assignor's former associates to whom he conveyed his share in the land.

A bill in equity may be maintained to remove a cloud from the title to land consisting of an equitable interest appearing of record which the holder has lost the right to enforce by reason of laches.

TWO BILLS IN EQUITY, filed respectively on November 20, 1903, and February 14, 1905, the first by Henry N. Sawyer against George M. Cook of Chicago and Mary A. Cook his wife, to remove a cloud from the plaintiff's title to certain land on Pleasant Street and Hancock Street in that part of Boston called Dorchester, and the second by the defendants in the first case against the plaintiff in the first case to enforce an alleged trust in the same land, and for an accounting.

The defendants in the first case demurred, and the defendant in the second case also demurred. In the Superior Court the cases came on to be heard together upon the bills and demurrers before *Fessenden, J.*, who reserved them for determination by this court. In each case if the demurrer was sustained, without allowing amendment, the bill was to be dismissed; otherwise, such order was to be made as justice and equity might require.

*P. G. Bolster*, for George M. and Mary A. Cook.

*W. D. Turner*, for Sawyer.

BRALEY, J. Under the deed by which title was acquired originally to the land referred to in these bills of complaint Nathan Sawyer since deceased, his son Henry N. Sawyer, and George M. Cook, parties to the present suits, became seised as tenants in common of a large tract of unimproved real estate. The purchase price was \$65,000, and of this amount \$38,000 was secured by a mortgage back to the grantor, while the remaining \$27,000 was paid in money, advanced by father and son, with the exception that of this sum \$5,000 was the avails of a promissory note made by all the grantees, which has since been paid by the first two.

Within a short time after their acquisition of title, at the request of the other grantees, Cook conveyed to them his interest. A week later all the parties mutually sealed, executed, acknowledged and delivered the written agreement which is the



foundation of each of these suits. Their legal relations and corresponding rights are to be determined under this deed, with the accompanying agreement, as obviously they are parts of and form one transaction.

It evidently was the common purpose to divide this tract into lots, put them upon the market, and by their joint efforts, not only to realize from sales the original cost, but also to make a profit by the venture. For convenience in making conveyances, it is expressly stated that the fee is conveyed by Cook to them. They also are permitted to first repay themselves from the money received from sales for all advances made at the time of purchase, and further are authorized also to pay therefrom the outstanding mortgage and the unsecured note. By this arrangement a less cumbersome method in disposing of the lots, and at the same time providing security for payments of advancements and money borrowed, was perfected. After the full indebtedness had been paid they all were to share in the money received from the remaining lots as sold, in the proportion, however, of one fourth to Cook and three fourths to the Sawyers.

The plaintiff, Sawyer, who has acquired the title of his father, and now is seised in fee and in possession of the land remaining unsold, contends that this agreement is to be treated as a simple contract and nothing more, under which Cook did not gain any equitable interest in the real estate.

But, while the latter conveyed the fee, it was only for the accomplishment of the objects recited in the agreement.

No particular form of words is required to create a trust. But whether one exists or not is to be ascertained from the intention of the parties. *Carpenter v. Cushman*, 105 Mass. 417, 419. *Brown v. Combs*, 5 Dutch. 36, 39.

Plainly, Cook did not intend to surrender the advantage coming to him under the bargain, though willing that his associates for their own security and convenience should have the sole legal title, while it was understood between them that the instrument should not be placed on record. Even if the ratio of division was changed from what it would have been under the first deed, the less amount coming to him well may have been decided upon in view of the financial burden assumed by them to which he had not proportionately contributed. They engaged and became



bound to deal with the property not only for their own benefit but for his. In doing so they were under an obligation to proceed diligently, to act in good faith in its management, to account for all sales, and to pay over his share of the common fund, which upon sales being made took the place of the land. Although not nominally so designated they thus became trustees under an express trust. *Baylies v. Payson*, 5 Allen, 473, 488. *Urann v. Coates*, 109 Mass. 581. *Brown v. Cowell*, 116 Mass. 461. *Dorr v. Clapp*, 160 Mass. 538.

We proceed then to inquire whether Cook, or his assignee, can maintain their bill for an accounting.

The parties contemplated, and it is expressly stipulated, that all are to "make use of their best skill and exertions to make sale of said real estate." There was a joint enterprise to the successful promotion of which each was to contribute his time and services. No permission is given, nor is any implied, that either party without the assent of the other should assign his interest, and while freeing himself from a personal performance of his part of the obligation insist upon its satisfaction by the other.

All clearly were bound to participate in the joint undertaking, and to contribute their individual efforts for its success. *Griggs v. Moors*, 168 Mass. 354, 361.

If Mary A. Cook, as the assignee of her husband, in equity can bring suit in her own name on the cause of action assigned, her right of recovery is commensurate with whatever equitable claim he may have. When this is ascertained her rights also are defined. *Pike v. Waltham*, 168 Mass. 581. *Chapin v. Pike*, 184 Mass. 184. *Grigg v. Landis*, 6 C. E. Green, 494, 514.

In order to make the enterprise commercially profitable it was contemplated that the lots should at once be put upon the market, and sales continuously made, until all were sold. The element of time thus became material, and before any final accounting could be asked for by Cook he must have performed his covenant. *Garcin v. Pennsylvania Furnace Co.* 186 Mass. 405. *Dunklee v. Adams*, 20 Vt. 415.

Instead of contributing his services to the development of what had been undertaken, after little more than a year had elapsed, by his demurrer he admits that voluntarily he ceased to



participate, made an assignment of his interest through a third party to his wife, then went into bankruptcy, and shortly thereafter removed from the State. And under the allegations of his own bill from 1876, when he severed his connection with the enterprise, to 1905, when he brought this suit, or for a period of twenty-nine years, he failed to make any exertions, use his skill, or interest himself in any manner in making sales.

But one conclusion justly can be reached, which is that he deliberately failed to perform the reciprocal duties imposed upon him, and intentionally abandoned the undertaking.

It is argued that if the rendition of services by Cook is treated as a condition precedent to any right to an accounting by him of all that has been done under the trust up to the time of his suit, such construction is equivalent to a forfeiture of his equitable interest. The result thus reached would be the same as if the stipulation were considered a condition subsequent where equity affords relief from a forfeiture, but does not lend assistance to enforce it. *Horsburg v. Baker*, 1 Pet. 232, 236.

But while the principle invoked is well settled, and should be applied in a proper case to prevent injustice, in the discretionary power of a court of equity it should not be used to the manifest wrong of those against whom its application is sought. *Mactier v. Osborn*, 146 Mass. 399, 402. *Henry v. Tupper*, 29 Vt. 358.

Performance of the agreement as originally contemplated was made impossible by the act of Cook. He deliberately put the whole burden upon his associates, with any attendant inconvenience and loss to them which might arise from his failure of co-operation. They are not in default, and to allow him to treat his failure to perform as conferring a vested right, that gives to him the same measure of recovery as if he had fully performed, is but another way of saying that he can take advantage of his own wrong to their detriment.

While they were justified in view of his bankruptcy and subsequent conduct in taking the position that he had relinquished all claim upon them, and that they held the absolute title free from his equitable interest, it does not appear from the allegations of the first bill that by any overt act they made this position known to him.

And it is strongly urged that as the statute of limitations does



not run in favor of a trustee under an express trust until by some positive act he has repudiated the trust, and claims to hold adversely, with notice, to the *cestuis que trust*, the mere lapse of time that here appears is not sufficient to bar his right to demand an accounting. *Currier v. Studley*, 159 Mass. 17. *Potter v. Kimball*, 186 Mass. 120.

But it was said by Gray, J. in *Speidil v. Henrici*, 120 U. S. 377, "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are also discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' *Smith v. Clay*, 3 Bro. Ch. 640, note. . . . When the bill shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer." See also *Codman v. Rogers*, 10 Pick. 111, 119; *Snow v. Boston Blank Book Manuf. Co.* 153 Mass. 456, 458; *Tetrault v. Fournier*, 187 Mass. 58; *Sullivan v. Portland & Kennebec Railroad*, 94 U. S. 806, 812; *Hammond v. Hopkins*, 143 U. S. 224.

The analogy of the statute of limitations therefore is not decisive. By his failure to act when if at all he was entitled to relief, and after he had acquiesced in a delay of more than a quarter of a century before bringing his bill, he will not be permitted by a court of equity thus to speculate upon the possible chance of sharing in profits due to the efforts of others under a mutual arrangement which he purposely has repudiated. *McClellan v. Coffin*, 93 Ind. 456, 459.

The further suggestion is made that at least his bill can be maintained for an accounting during the time when he acted.

Without considering how far the assignment in bankruptcy deprived him of any right in the land, or money derived from its sale, the radical change in the carrying out of the original plan



that was caused by his abandonment, when coupled with the exceptional delay in the assertion of the claim which he now puts forward, and in the absence of any explanatory allegations appearing in his bill, make it inequitable to grant any measure of relief.

If he seeks equity he must be free from unconscionable conduct on his own part. Under the circumstances to which we have fully adverted, and in the absence of accident, fraud, or mistake, which do not appear, he has placed himself well within the prohibition of this salutary principle. *Hancock v. Carlton*, 6 Gray, 39, 52. *Blake v. Traders' National Bank*, 145 Mass. 13, 17. *Mactier v. Osborn*, *ubi supra*. *Lundin v. Schoeffel*, 167 Mass. 465.

The plaintiff Sawyer having brought suit within the time when if not in possession he could have maintained a writ of entry, counting upon the act of Cook in recording the agreement in 1890 as a disseisin, the remaining question is whether he can maintain his bill for its cancellation.

By recording the agreement Cook asserted at the time of its record an outstanding claim of an equitable interest which, in the light of the facts now shown, he could not enforce.

Its record as to strangers, however, would have shown a trust that by force of our laws relating to the recording of deeds would have charged purchasers of the lots with constructive notice, and they might have been held answerable for the application of the purchase price. *White v. Foster*, 102 Mass. 375. Being a part of the transaction under which title was acquired, its record at that time would not have created a cloud thereon, nor did it become such by being placed on record nearly twenty years thereafter in the absence of extrinsic evidence to show that the rights of the parties had changed.

Although this instrument for the reasons previously stated had ceased to be effective, yet when read in connection with the recorded deed to which it refers, there would be shown on the face of the whole record an outstanding equitable estate held by Cook or his assignee. *Harper v. Tidholm*, 155 Ill. 370, 376.

That an apparent incumbrance of this character might operate to diminish the market value of the land and deprive the complainant of possible purchasers is clear.



It also is plain that the true state of the title only could be made manifest by resort to parol evidence on his part, and with increasing lapse of time such evidence gradually becomes unavailable, and finally is lost. Where such conditions appear a bill can be maintained for the cancellation of a void instrument which clouds the title of the real owner of the land. *Martin v. Graves*, 5 Allen, 601, 602. *Sullivan v. Finnegan*, 101 Mass. 447. *Loring v. Whitney*, 167 Mass. 550, 552. *Loring v. Hildreth*, 170 Mass. 328. And this relief may be granted even if a technical forfeiture of the estate which constitutes the incumbrance follows, where it appears that all rights under it have been lost by the wilful and prolonged neglect of the party who otherwise might have preserved and enforced his title. *McClellan v. Coffin*, *ubi supra*.

It follows under the terms of the reservation that in the first case the plaintiff is entitled to a decree for the cancellation of the agreement, and in the second case the bill is to be dismissed.

*Decrees accordingly.*

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### MANSARD JOHNSON vs. EDWARD L. HOLMES.

Suffolk. November 17, 18, 1904. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Seaman. Ship. Negligence.*

In an action by a seaman against the master of a vessel on which he was employed, for alleged aggravation of an injury from having the fingers of his right hand frozen while pounding ice from the rigging, by the defendant's failure to provide proper medical and surgical treatment and keeping him at work after his injury, it appeared, that the vessel was a three masted schooner carrying a cargo of coal from Baltimore to New Bedford in the month of February, and was short handed, having on board only the master, the mate, who had been injured, four seamen and a steward, that she experienced very cold weather, a blizzard and heavy gales, and was in danger during the three days from the time of the plaintiff's injury until the plaintiff turned into his bunk and ceased to work, that the plaintiff's hand, as soon as he returned to the deck after having it frozen, received the proper treatment by being immersed in ice or in cold water until warmth and feeling came back, and thereafter was treated by the application of grated potatoes as a poultice, which was shown to be an ordinary remedy. *Held*, that it was the duty of the defendant to decide what under the



circumstances to do with and for the plaintiff in connection with all the duties resting upon him as master of the vessel, and that there was no evidence which would justify a finding that the defendant's decisions as to what he should do in managing the vessel and in his treatment of the plaintiff were not reasonable and proper at the times and under the circumstances when they were made. Also, that it was not material that the defendant did not give the plaintiff oil for his hand when he asked for it, as it was shown that the defendant furnished the ordinary remedies.

TORT, by a seaman against the master of a vessel on which he was employed, for aggravation of an injury received by the plaintiff from having the fingers of his right hand frozen, with originally a first count for the injury itself, which was discontinued as explained in the opinion. Writ dated October 30, 1893.

The previous course of the case including a decision of this court is described in the opinion. The second trial was before *Aiken, J.*, who reported the case for determination by this court, concluding his report as follows: "At the trial in the Superior Court before me, the jury returned a verdict for the plaintiff which I set aside as not warranted in law; and with the consent of the parties I report the case for the determination of the Supreme Judicial Court. If the ruling was right, judgment is to be entered for the defendant; otherwise judgment is to be entered for the plaintiff for the sum of \$2,250, that being the amount of the verdict of the jury, to which interest is to be added from the sixth day of April, 1903."

The case was argued at the bar in November, 1904, before *Knowlton, C. J., Morton, Lathrop, Barker, & Loring, JJ.*, and afterwards was submitted on briefs to all the justices.

*M. H. Browne, (J. M. Browne with him,)* for the plaintiff.

*F. H. Smith, Jr., (E. P. Carver with him,)* for the defendant.

BARKER, J. The plaintiff was a seaman on the schooner *Nellie W. Craig*, chartered by the defendant, who commanded as master upon a voyage from Baltimore to New Bedford in February, 1893. While the vessel was at anchor off Barnegat, on February 20, 1893, the plaintiff was kept in the rigging pounding off ice, and there froze his right hand. He sued to recover compensation for the injury, declaring in two counts. He first sought to recover for the injury naturally resulting from the freezing, alleging that the defendant wrongfully and wilfully kept him in the rigging and refused to let him come



down and warm his hands, the defendant knowing well that the plaintiff's hands were freezing, and knowing that he had requested repeatedly to be allowed to come down and warm his hands. The second count sought to recover for an alleged aggravation of the injury to the plaintiff's hand by reason of an alleged neglect to furnish the plaintiff with medical and surgical treatment, wrongfully keeping him on board the vessel without proper care and medical treatment, and compelling him, while so disabled, to perform the duties of a seaman on the vessel.

Upon the first trial of the action the jury found for the defendant on the first count, thus finally removing from the case all questions except that of the defendant's liability for an aggravation of the injury by subsequent negligent or wrongful conduct on the part of the defendant. On the second count the jury returned a verdict for the plaintiff, which was set aside upon the sustaining of the exceptions taken at the trial on the part of the defendant. At the hearing of those exceptions it was not contended that it was the duty of the defendant to have put into some intermediate port, and the question then considered by this court was whether there was evidence that no proper treatment was afforded the plaintiff on the vessel after the hand was frozen. This question was decided adversely to the plaintiff in an opinion which sustained the exceptions. See *Johnson v. Holmes*, 173 Mass. 514.

After that decision, the plaintiff discontinued as to his first count and amended his declaration by adding a third count which, like the second, is for the wrongful aggravation of the injury originally suffered by the freezing of the hand, differing only in alleging a neglect to furnish treatment for the alleviation of the plaintiff's pain and suffering as well as for the cure of the frost bite, and also in alleging that the compelling of the plaintiff to work while disabled was unnecessary and without cause.

At the second trial, which was upon these two counts, the jury found a general verdict for the plaintiff. This verdict was set aside by the presiding judge "as not warranted in law," and with the consent of the parties he reported the case for the determination of this court. By the terms of the report thus consented to, if the ruling that the verdict was not warranted in law was right, judgment is to be entered for the defendant;



otherwise, for the plaintiff in a sum stated in the report. All the material evidence is recited in the report.

As it was the province of the jury to weigh the evidence to find what facts were established by it and to make also reasonable inferences of fact, the question presented by the report is whether upon the evidence the jury reasonably could find any state of facts showing that, after the plaintiff came down from the rigging, his injury was aggravated by any wrongful neglect to give him such care and treatment as could be afforded him on the vessel under the then existing circumstances, or by any wrongful compulsion exercised to make him perform the work of a seaman on board. In resolving this question, as the verdict was for the plaintiff and as it was not set aside as contrary to the evidence or the weight of the evidence, but as not warranted in law, wherever there was a conflict of evidence the facts reasonably to be inferred from it are to be taken in favor of the plaintiff, and all reasonable inferences of fact are to be drawn in his favor.

The vessel, a three masted schooner laden with coal, left Baltimore for New Bedford on February 9. That voyage is ordinarily a voyage of six or seven days. When ten days out, to wit, on Sunday, February 19, at eleven o'clock at night, the wind came out from the N. N. W. and blew a blizzard, very cold. At 2 A. M. that night the mate was injured. At 5.30 A. M. (according to the plaintiff), at 6.30 A. M. (according to the mate) and at 7 A. M. (according to the defendant — the captain —), the schooner anchored at Barnegat, a good harbor for a west wind but no harbor at all for an east wind, — just an anchorage on a lee shore in an east wind.

There was a conflict of testimony between the plaintiff and the captain as to the condition of the schooner at Barnegat.

The plaintiff testified "that no sail was blown away," and that "the sails were not iced up."

The captain testified that "they lost the forestaysail, the other staysail blew in ribbons," and "the foresail and mainsail were disabled"; also that "the vessel was so badly iced up that in order to get the sails down they had to go into the rigging and cut the halyards." The captain's story is that all hands were busy all Monday clearing the vessel from ice, thawing out the



halyards and splicing them again, and that this work was not ended until 4 P. M. on Tuesday, although the vessel was under way on Tuesday, after 10 A. M.; that the halyards, after being cut, had to be put "in the stove oven" and kept there "four or five hours before they could get a temporary rough splicing in order to hoist the sails again." The barometer indicated that an east wind was coming on. The crew seem to have knocked off work at 5 P. M. on Monday, but the captain says "that he was not able to clear up his vessel until four o'clock Tuesday afternoon." It was cold and blew a gale all day Monday, while they were at anchor at Barnegat. On Monday night, at three o'clock, A. M., the weather permitting, the captain began to weigh anchor. He had two anchors down, one weighing thirty-five hundred pounds, with fifty to sixty fathoms of chain, and the other weighing three thousand pounds, with thirty to forty fathoms of chain. They got up the anchors and got under way at 10 A. M. Johnson says 7 A. M.

When they got under way the wind was fair and moderate. "He [the captain] considered his vessel in peril on Tuesday, ever [*sic*, for even] after she got under headway, as the sea was too calm and the easterly wind was striking on it." The captain also testified that "the vessel was sailing along very slowly with a fair wind, with sails iced up and the crew cutting ice out of them to get them ready to set."

What the captain's story means is this: With an east wind the schooner was on a lee shore. When he came to anchor his sails were reefed and all iced up. All Monday, the gale still blowing, all hands were cleaning the vessel from ice and splicing the halyards as described, and did not finish when supper time came at five o'clock. That night the gale passed off with indications that the wind would come in from the east. At three o'clock that night, the weather permitting, he began to get up two large anchors having heavy chains out, — a terrible piece of work without steam. He got the schooner under way at ten o'clock; the plaintiff says seven o'clock. Then he had to shake out the reefs from the frozen sails after getting under way, and get them set; and also he had to set the light sails, the wind being east and too light. In other words, the wind was so light he had to get all sail on her to keep her off the lee shore after



he got his anchors, and he had to get his anchors for he could not stay anchored with the wind coming in east, which made the shore a lee shore. He says he succeeded in getting the necessary sail on her at four o'clock Tuesday afternoon. The wind then came in from the southeast, and by eight o'clock was blowing hard, with a blinding snow storm, and we infer that they had to reef her down. This gale blew that night, the next day, Wednesday, and Wednesday night. Thursday morning it moderated as they entered Buzzard's Bay, and at eleven o'clock they docked at New Bedford.

The plaintiff says that he turned in to his bunk at midnight Tuesday night, and stayed there until he got out at New Bedford. This is contradicted by the captain.

Upon the question whether the plaintiff was furnished all available proper treatment for the frostbite, as distinguished from treatment for the alleviation of his pain, the evidence at the second trial seems to have been more favorable to the defendant than that at the first trial. At both trials it was shown that the only proper initial treatment was the very gradual thawing out of the hand by immersing it in ice or in cold water until warmth and feeling came back. At both trials the evidence showed that at once on returning to the deck the plaintiff received this treatment. At both trials it appeared also that thereafter the hand was treated by the application of grated potatoes as a poultice. At the first trial there was no evidence that this application was beneficial or otherwise. At the second trial there was uncontradicted evidence that the application of grated potatoes to frostbites was beneficial and common. We think that, aside from the questions whether there was aggravation of the plaintiff's injury by wrongfully compelling him to work, and whether all was done that reasonably could be done to alleviate his pain, the jury would not have been justified in finding that there was any actionable neglect to afford him reasonable treatment for the cure of the frostbite.

The only evidence as to the plaintiff's having been compelled to work against his protest was in his being put to shovelling ice on the afternoon of the day on which his hand was frozen, after it had been thawed out, and made to steer the next day. He admitted that "shovelling ice was easier work than hauling



sails and ropes." At this time his hand had been thawed out and was bandaged ; "it had not become swollen," and had not begun to crack ; "it did not crack Monday." As to his steering on the next day, it took all hands from three o'clock A. M. until 7 A. M., as the plaintiff testified, or until 10 A. M., as the defendant testified, to get the anchors ; and after that all hands had to shake out the reefs and clear the sails of ice, to keep the schooner from being caught on a lee shore by the east wind which was predicted by the barometer, and which came as a gale at eight o'clock Tuesday night. The plaintiff testified that he turned into his bunk at midnight on Tuesday night and stayed there until the schooner got into New Bedford. We see nothing here which would warrant a jury in finding that the defendant was negligent in his treatment of the plaintiff.

The defendant was master of the vessel, and as such he alone was charged with the responsibility for its safety and that of its cargo and crew. If conflicting duties called him, he himself in the first instance was the judge of what he ought under the circumstances to do with and for the plaintiff in connection with all the duties resting upon him as master of the vessel. If in the exercise of his honest judgment at the time he felt that his whole duty as master required him to compel the plaintiff to work, and required him to refuse to leave his own post to procure aid for the plaintiff when requested, neither of those acts could be found to be wrongful or negligent on the part of the defendant, unless the evidence sustained the burden which was upon the plaintiff to show that the defendant's decision was not reasonable and proper at the time and under the circumstances. *Danvir v. Morse*, 139 Mass. 323, 324.

We think that the evidence reported compels the conclusion that the vessel was in peril from a time before that when she was brought to anchor off Barnegat until the plaintiff turned into his bunk at midnight on Tuesday night, that the defendant so judged, and that whatever he did in compelling the plaintiff to work and in refusing to get him aid was done honestly in accordance with the defendant's judgment of his whole duty as master under the then existing circumstances. We think further that the evidence would not justify a finding that this decision of the master was not reasonable and proper under the



circumstances. Owing to an injury to the mate, the whole force of men aboard, consisting of the captain, the mate, four seamen and the steward, the vessel was short handed. In the north-westerly gale which compelled her to anchor off Barnegat she had become iced up. Her position at anchor near the shore made it necessary that she speedily should be freed from ice and got under way and farther off shore before the wind should come from the east as the barometer indicated that it would come, and as it shortly did. The only possible cause to doubt the reasonableness or propriety of the defendant's decision as to what he ought to do for or with the plaintiff is the testimony of the latter that "he didn't see the captain doing anything in the meantime [i. e. on Monday afternoon] except walking around backwards and forwards." This is not enough to contradict the captain's story as to the condition of things and as to what he, the captain, was doing, namely, that "he [Holmes] was busily engaged in pounding ice and helping to splice the halyards; that the halyards were iced up, and they had to take them and put them in the stove oven and keep them there four or five hours before they could get a temporary rough splicing in order to hoist the sails again." The plaintiff may not have seen this work by the captain and yet he might have been at it.

We do not think it material that the captain did not give the plaintiff oil when he asked for it. The captain was not negligent if he furnished one of the ordinary remedies, and it was proved that a potato bandage is an ordinary remedy, and that was furnished on Monday at five o'clock.

In the opinion of a majority of the court there should be

*Judgment for the defendant.*



## JOHN T. SCULLY vs. COMMONWEALTH.

Suffolk. January 19, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, &amp; BRALEY, JJ.

*Tide Water. Statute, Construction. Lechmere Point Corporation.*

Section 2 of St. 1809, c. 95, authorizing the Lechmere Point Corporation created by that act to hold a certain tract of land, with power to make streets through it, divide it into lots and build walls to protect it from the water, and to manage and improve it according to the will and pleasure of the proprietors, contains no grant by the Commonwealth of a right to fill flats.

PETITION, filed June 22, 1904, under R. L. c. 201, to recover \$2,019.67, with interest from January 25, 1893, and \$2,550, with interest from August 23, 1901, paid by the petitioner to the Commonwealth as assessments for the displacement of tide water by the filling of certain flats in the Charles River.

The respondent demurred. In the Superior Court *Sheldon, J.* sustained the demurrer and ordered judgment for the respondent. The petitioner appealed.

The petition alleged that the petitioner was the successor in title of the Lechmere Point Corporation. Section 2 of St. 1809, c. 95, the charter of that corporation, is as follows :

“Sect. 2. Be it further enacted, That the said corporation be capable to have, hold, and possess such part of the said tract of land as may belong to the said proprietors named in this act, and of any others who may associate with them, and shall have power to make streets through the same, and divide it into lots, and to build walls to protect the same from the water, and to erect buildings thereon, and the said corporate property, or any part thereof, to grant, sell, and alien, in fee simple or otherwise, and to lease, exchange, manage, and improve the same according to the will and pleasure of the proprietors, or the major part of them present at any meeting, to be expressed by their votes.”

*A. W. Blakemore, (E. R. Champlin with him,)* for the petitioner.

*F. H. Nash,* Assistant Attorney General, for the respondent.

LORING, J. This is a petition to recover back from the Commonwealth, money paid to it under a mistake of fact. It sets



forth that on two occasions the petitioner filed petitions with the harbor and land commissioners for a license under Pub. Sts. c. 19, to fill in flats over which the tide ebbed and flowed, and that upon the petitions he received two licenses dated May 23, 1889, and January 26, 1900, respectively, under which he paid the Commonwealth the sums of \$2,019.67 and \$2,550; that in May, 1904, he learned of the existence of an act of the Legislature passed March 3, 1810, (St. 1809, c. 95,) entitled "An Act to incorporate certain persons into a company by the name of the Lechmere Point Corporation," which act he contends gave the persons therein named the right to fill the flats then owned by them; that the flats covered by the licenses in question were owned in 1810 by the persons named in that act, and that the plaintiff now holds under them.

We are of opinion however that no right to fill flats over which the tide ebbed and flowed was given by the act of 1810. The section relied on by the petitioner is § 2. But that is not a grant of a right by the Commonwealth to fill flats; it is nothing more than the definition of the powers of the corporation created by the act. There are many instances of acts granting the right to fill flats. See St. 1851, c. 26 (the act in question in *Bradford v. McQuesten*, 182 Mass. 80); St. 1852, c. 105, and St. 1855, c. 481 (the acts in question in *Bradford v. Metcalf*, 185 Mass. 205); St. 1855, cc. 40, 54, 108, 181, 182, 209, 330; St. 1856, c. 57; St. 1857, cc. 288, 296; St. 1860, cc. 108, 110, 111, 112, 114, 116, 117, 118, 119, 132, 134.

But the act in question is not like these acts; on the contrary the terms used are in contrast to them. The section of the act in question is so plainly an act defining the powers of the corporation as between it and its stockholders and as between the Commonwealth and the corporation, and not an act which grants to it rights of property in the flats owned by it, that nothing more need be said.

*Judgment for the Commonwealth affirmed.*



SELECTMEN OF HYDE PARK vs. OLD COLONY STREET  
RAILWAY COMPANY.

Norfolk. January 23, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Street Railway. Way.*

Under Pub. Sts. c. 118, § 7, the selectmen of a town in granting an original location to a street railway company could impose a more onerous duty as to repairs of the public ways than that imposed by the general laws.

A condition imposed by the selectmen of a town in granting an original location to a street railway company under Pub. Sts. c. 118, § 7, that the company shall keep that portion of the streets and highways included between its tracks and for a distance of eighteen inches outside thereof at all times flush with the top of the track and shall keep the same in repair to the satisfaction of the selectmen, is valid.

Under Pub. Sts. c. 118, § 7, as well as under St. 1898, c. 578, § 13, which expressly provides for imposing methods of construction, the selectmen of a town in granting an original location to a street railway company could impose a condition, that the railway company should reconstruct its track and roadbed with such different material as the board of selectmen might require.

The last clause of § 13 of St. 1898, c. 578, in regard to the granting of locations to street railway companies, providing that "all locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of this section," is in effect a declaration that the interpretation given in practice to Pub. Sts. c. 118, § 7, was correct.

A condition contained in the original grant of location to a street railway company by the selectmen of a town was as follows: "Said railway company shall reconstruct their track and roadbed by laying down such different material therefor as the board of selectmen after public hearing may judge that public safety and convenience requires; but no radical change in material of said track or roadbed shall be made until after the road has been in operation one year, except to make necessary repairs." *Held*, that under this condition the selectmen could make a valid order requiring the railway company to take up fifty pound T rails specified in the location and replace them by ninety pound girder rails.

BILL IN EQUITY, filed March 7, 1904, under R. L. c. 112, § 100, by the selectmen of the town of Hyde Park to enforce the terms of a railway location granted on March 8, 1898, and accepted by the defendant through its directors.

The defendant demurred, and the case came on to be heard upon the bill and demurrer before *Lathrop, J.*, who reserved it for determination by the full court. If the demurrer should be sustained the bill was to be dismissed. If the demurrer should



be overruled the defendant was to answer and the case was to stand for trial on its merits.

*C. F. Jenney*, for the plaintiffs.

*E. W. Burdett*, (*J. Gordon* & *G. H. Knight* with him,) for the defendant.

LORING, J. This is a bill in equity under B. L. c. 112, § 100, to compel the observance of an order of the plaintiff board, made on December 19, 1903. The order was confined to the tracks operated and maintained under the original location granted to the Norfolk Suburban Street Railway Company on March 3, 1893, and directed the defendant corporation as the successor of said Norfolk Suburban Street Railway Company (1) to reconstruct its tracks and roadbed, and (2) to keep in repair and flush with the top of its tracks the portion of the streets and highways included between its tracks and for a distance of eighteen inches outside thereof.

The restriction as to repairs, being contained in an original location, is not affected by St. 1898, c. 578, § 11, and does not come within *Worcester v. Worcester Consolidated Street Railway*, 182 Mass. 49.

For convenience we will in substance follow the order in which these questions have been argued by the defendant and will first take up the question of repairs.

The original location was granted to the defendant's predecessor on March 3, 1893, that is to say, under Pub. Sts. c. 113, § 7.

One of the "terms and restrictions" subject to which the location was granted was this: "The railway company shall keep that portion of the street and highways as are included between its tracks and for a distance of eighteen inches (18") outside thereof, at all times flush with the top of the track, and shall keep the same in repair to the satisfaction of the selectmen."

The duty of repair imposed by this restriction was more onerous than the duty imposed by the general laws then in force. Under the laws then in force, the duty imposed on street railways in respect to keeping public ways in repair was that which originated in St. 1881, c. 121, re-enacted in Pub. Sts. c. 113, § 32, and was confined to keeping in repair "the paving,



upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks." See *Leary v. Boston Elevated Railway*, 180 Mass. 203. The duty of repair under earlier statutes may be found in St. 1864, c. 229, § 18; St. 1866, c. 286; St. 1871, c. 381, § 21.

The defendant's contention is that no power was given to the selectmen in granting a street railway location under Pub. Sts. c. 113, § 7, to impose a more onerous duty in respect of repair than that imposed by the general laws.

Its counsel relies on *Keefe v. Lexington & Boston Street Railway*, 185 Mass. 183, as decisive of that question. He points out that that case arose under St. 1898, c. 578, § 13, which expressly gives to selectmen more extended powers than are conferred upon them in terms by Pub. Sts. c. 113, § 7. By § 13 of St. 1898, c. 578, it is provided that in granting a location the selectmen "may prescribe the manner in which said tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose such other terms, conditions and obligations in addition to those applying to all street railways under the general provisions of law, as the public interest may in their judgment require."

The power of the selectmen under Pub. Sts. c. 113, § 7, was to grant a location "under such restrictions as they deem the interests of the public may require." This is a re-enactment of St. 1864, c. 229, § 14, and St. 1871, c. 381, § 14.

But the decision in *Keefe v. Lexington & Boston Street Railway* does not reach the case now before us. That was not a case where something was added to the burden imposed by the general laws, as is the fact in the case at bar, but a case where the company undertook to deal with a matter in a way which was inconsistent with the way in which the general laws then in force directed it to be dealt with. The restriction in the location in that case fixed absolutely the fares to be charged. The laws then in force, Pub. Sts. c. 113, § 43, gave the directors a right to establish the rates of fare subject to their being regulated by the railroad commissioners under St. 1898, c. 578, § 28. Further there



was an additional reason for reaching the conclusion reached in *Keefe v. Lexington & Boston Street Railway*, (that after St. 1898, c. 578, the rate of fares could not be fixed by a restriction in a grant of location,) namely: Before St. 1898, c. 578, the power of selectmen to fix the rate of fare by inserting a restriction to that effect in a grant of location was expressly recognized. St. 1864, c. 229, § 26. St. 1871, c. 381, §§ 34, 35. Pub. Sts. c. 113, §§ 44, 45. These acts were repealed by St. 1898, c. 578, § 26, subject to which the location there in question was granted. We therefore are of opinion that this particular contention of the defendant is not well taken, to wit, that the case of *Keefe v. Lexington & Boston Street Railway* decided that in granting a location under Pub. Sts. c. 113, § 7, no duty can be added to that imposed by the general laws.

We also are of opinion that its more general contention is not well taken, that the duty of repair imposed in the grant of location here in question was void.

We are of opinion that the power of selectmen under Pub. Sts. c. 113, § 7, goes at least as far as this, namely, to put such restriction upon what otherwise would be an absolute grant as the public interest requires from the grant having been made. See *Newcomb v. Norfolk Western Street Railway*, 179 Mass. 449. The effect of laying tracks in an unpaved street manifestly results in the street outside the rails, and particularly the part immediately next to the rails, being unduly worn down, thus imposing on the town in question an additional burden in the repairs of that way. So likewise the space between the rails is subject to a different use from an ordinary road or from the rest of such a road. To require the railway to keep that portion of the way "included between its tracks and for a distance of eighteen inches (18") outside thereof, at all times flush with the top of the track" and in repair, is in effect to restrict the company from so operating its railway under the location as to cast an additional burden upon the town in respect to repairs of the public ways on which the railway is located and operated. It follows that the restriction as to repairs was and is valid.

We pass to the order directing the defendant to reconstruct its track and roadbed.

The restriction on this matter contained in the grant of location



was as follows: "Said railway company shall reconstruct their track and roadbed by laying down such different material therefor as the board of selectmen, after public hearing, may judge that public safety and convenience requires; but no radical change in the material of said track or roadbed shall be made until after the road has been in operation one year, except to make necessary repairs."

The order made by the selectmen under the restriction directed the defendant to reconstruct the track and roadbed "by reconstructing said track with new girder rails weighing not less than ninety pounds to the yard and not less than sixty feet in length, and by paving the part of the streets occupied by it under said original location between its tracks and for a distance of eighteen inches outside thereof on both sides, with paving stones," of a kind and set in a way there particularly described, "using in said reconstruction sleepers of chestnut or hackmatack."

The defendant's first contention is that the restriction as to reconstruction contained in the location was void.

The validity of a restriction as to reconstruction was dealt with by this court in the recent case of *Selectmen of Gardner v. Templeton Street Railway*, 184 Mass. 294. But the location in question in that case was granted under St. 1898, c. 578, § 13, which, as we have already pointed out, gives more extended powers than are given in terms to selectmen under Pub. Sts. c. 113, § 7, and expressly provides that the method of construction of the railway may be dealt with in the location. That case therefore is not necessarily an authority here. But that case is an authority for the power to insert a restriction as to reconstruction, if the construction of the railway is a matter which can be dealt with in a restriction in granting a location under Pub. Sts. c. 113, § 7.

We come therefore to the question whether as matter of construction the power given to selectmen by St. 1898, c. 578, § 13, is greater than that given them by Pub. Sts. c. 113, § 7. The present form of St. 1898, c. 578, § 13, now R. L. c. 112, § 7, was suggested by the commissioners appointed under St. 1897, c. 509, whose report is House Document 475 for the year 1898. It is there said that the provision here in question "modifies the



existing law, . . . only in so far as is necessary to make it conform to the interpretation of that law which has in practice grown up." p. 48. See also pp. 22, 23. By this we understand that the commissioners meant to say that the language of the statute is modified, not that the statute has been changed. The question we now have to decide is whether, as matter of construction, the statute was changed by this change in the terms of the act; and we are of opinion that it was not.

The last clause of St. 1898, c. 578, § 13, provides that "all locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of this section." This clause was not reported by the commissioners. It is in effect a declaration that the interpretation given in practice to the former act was correct and we are of opinion that the former act should be construed accordingly. It follows that the restriction as to reconstruction contained in the grant of location here in question was valid.

The defendant's next contention is that if this restriction was valid originally it was rescinded by the last clause of St. 1898, c. 578, § 13. We see no ground for this contention. The last part of that clause does not abrogate the first part of it, which we have just decided goes as far as the Legislature could in ratifying the validity of all restrictions which could have been made under § 13.

The defendant's next objection is that the order made under this restriction directing the defendant to pave between its tracks and for a distance of eighteen inches outside thereof on both sides is void. Its contention here is that the defendant's obligation as to maintenance and repair of streets when the location was granted, was prescribed by Pub. Sts. c. 113, § 32, and that no additional burden in that connection could be imposed on it. This is but a repetition of the argument as to repairs, which we have already decided adversely to the defendant, and this contention falls with that argument.

The next contention is that if the restriction as to reconstruction was valid and is in force, the defendant cannot be required to take up the fifty pound T rails specified in the location and lay down ninety pound girder rails in place of them. The ground for this contention is that they are both of the same



"material." There is nothing in this. The case in this connection comes within *Selectmen of Gardner v. Templeton Street Railway*, 184 Mass. 294.

By the terms of the reservation

*The defendant shall answer and the case shall stand for trial on the merits.*



JOSIAH Q. BENNETT & another, trustees, vs. LOUISA  
H. PIERCE.

Suffolk. January 23, 24, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALRY, JJ.

*Trust, Accounts of trustee. Probate Court, Effect of decree. Estoppel.*

If a trustee, holding property under a will for the benefit of a married woman during her life and on her death for the benefit of her minor children, renders an account which is assented to by the beneficiary for life but is contested by the guardian *ad litem* of her minor children, and the Probate Court makes a decree disallowing in the account certain investments made in good faith by the trustee and ordering the trustee to restore to the trust from his own property the amount of the loss on the investments disallowed, although the beneficiary for life might have been found to have accepted the loss for herself by her assent to the account when presented, yet, after the decree disallowing the investments on the objection of the guardian *ad litem*, the account is no longer the one to which the beneficiary for life assented, and she is not estopped from claiming the full amount of interest as well as of principal to which she is entitled by the decree.

APPEAL from a decree made by *Grant, J.*, in the Probate Court for the county of Suffolk, charging the trustees under the will of Moses Day, successors in that capacity of Frederick Davis, deceased, and also the executors under the will of Frederick Davis, with interest to be allowed to Louisa H. Pierce, the beneficiary for life of the trust, on the amounts paid to the principal of the trust fund by the trustees under a previous decree of the Probate Court made on January 10, 1901, and confirmed by the decision of this court in *Davis, appellant*, reported in 183 Mass. 499, the amount of interest ordered paid being that charged to the deceased trustee by the decree of January 10, 1901, with legal interest thereon from the date of that decree.



The case came on to be heard before *Morton, J.*, who by agreement of the parties reserved it for determination by this court, on the record of the Probate Court and an agreed statement of facts and a supplement thereto.

*J. O. Teele, (F. F. Gerry with him,)* for the trustees.

*J. Codman,* for Louisa H. Pierce.

*C. S. Rackemann,* guardian *ad litem*, representing the issue of Mrs. Pierce claiming in remainder.

**BRALEY, J.** The discretionary powers given to the trustees under the will of Moses Day to invest and reinvest the trust estate were before this court for consideration in *Davis, appellant*, 183 Mass. 499, 502, where it was held, affirming the decree of the Probate Court, that certain investments in the stock and bonds of the Atchison, Topeka and Santa Fé Railroad Company, made by him as a predecessor in office of the appellants, were unauthorized. From the record of that case, and the recitals in the claim of appeal in the present case, it is to be assumed that pending his appeal Davis died testate, and that the appellants are the duly appointed executors of his will. It was there decreed that the loss caused to the principal fund by the depreciation in value of the stocks and bonds must be restored by the trustee out of his own property, with simple interest on the deficiency from the respective dates of purchase. This decree never has been modified, and still is in full force and effect. *McCooey v. New York, New Haven, & Hartford Railroad*, 182 Mass. 205. R. L. c. 162, § 2. In obedience to its terms, it became the duty of the present trustees upon their appointment to cause the impairment of the principal to be made good, and the accrued interest which was intended to repair the loss of income to be paid by the executors of the will of the delinquent trustee.

If their failure to act was found to be unjustifiable it was a breach of their trust, and in equity they could be held chargeable with the payment of both. *Blake v. Pegram*, 109 Mass. 541, 552. *Dodd v. Winship*, 144 Mass. 461, 465.

Under a partial compliance with this decree, they presented for allowance the account now before us in which they charge themselves as trustees with an amount received from themselves as executors sufficient to make whole the impairment of the principal. But they have failed thus far to account for the interest as decreed.



The present appeal is from a decree on their account, which, following the former decree, charged them with the interest then allowed, and with interest on that amount that has since accrued. In justification of their conduct they now contend that the appellee, a daughter of the testator, Joseph Day, and beneficiary for life under the trust, with remainder to her minor children, is estopped from making any lawful demand for what is now by force of the decree to be treated as an asset of the estate. *Kimball v. Perkins*, 130 Mass. 141. *Dodd v. Winship*, 133 Mass. 359.

Their position is grounded on the fact that as she assented in writing to preceding accounts of the former trustee, or trustees, which showed the purchase of these stocks and bonds, and especially because of such an assent by her to the fourteenth account covered by the first decree, where the trustees asked to be relieved from any loss made by them because of such purchase, she is precluded from asserting any claim for the interest. Whatever may have been shown in the accounts prior to the fourteenth as to these particular investments, it does not appear that she knew anything of their sound value, or that there was any reason which would cause her to look with distrust on the conduct or judgment of the trustees. If she had examined carefully the schedules itemizing the trust property they would not have disclosed that the reinvestments made by exchanging bonds of one series for those of another, but all emanating from the same system of railroads, had resulted in any diminution of the fund.

But when the fourteenth account was presented for her acceptance it appeared for the first time that such a loss had been made, from which the trustees asked to be relieved.

Under this account, when it came before the court, there was no controversy between the appellee and the accountants to be determined, and the decision finally made notwithstanding her assent, that they must make good the loss, was not the adjustment of any dispute between her and them which would require permission from the court before she could reopen the matter upon the settlement of their subsequent accounts. *Cummings v. Cummings*, 128 Mass. 532, 534. R. L. c. 150, § 17.

If she had been the only person interested an allowance of



this interlocutory account, in the absence of fraud, mistake or error, might have been treated as final so far as past transactions were involved. *Parker v. Boston Safe Deposit & Trust Co.* 186 Mass. 393. St. 1895, c. 288. But upon ascertaining that she had been innocently misled, or intentionally deceived, it would have been open to her on the presentation of succeeding accounts to have brought the matter to the attention of the court, and to have insisted upon a full accounting of the original fund by the trustees. *Wiggin v. Swett*, 6 Met. 194, 198. *Blake v. Pegram*, 101 Mass. 592, 598. *Foster v. Foster*, 134 Mass. 120, 122. *Gale v. Nickerson*, 144 Mass. 415, 417. R. L. c. 150, § 17.

It further may be said, that the right to interest was not in existence when the account was presented for her approval, for it might have been determined that the request made by the trustees could have been granted properly. If with a full understanding of the facts it was her purpose originally to relieve the trustees from the consequences of what she may have believed was an innocent mistake, even then it was for the court upon a proper inquiry to determine judicially whether she should be held to such an arrangement, and upon the refusal of the court to grant this relief a new situation immediately developed to the benefit of which she justly has been found entitled.

Besides, it is plain that her assent as life tenant, however formal, could not bind her minor children, who by their guardian *ad litem* rightly contended that the loss of the property must be repaired. For after the death of their mother they were entitled to the income from a fund that should come to them unimpaired by unfaithful administration. *Denholm v. McKay*, 148 Mass. 434, 448.

By assenting to the fourteenth account in the form in which it was prepared it could have been found on the face of the papers that for herself she accepted the loss as it appeared. But when under the objection of the guardian *ad litem* this account was disallowed, and the trustees were required to make good the deficiency, then upon such reformation it was no longer the account to which she had given assent. And she was not estopped, if she had been present in person or by counsel, nor is she now barred, from claiming whatever rights she had under this revised account, or the decree which followed thereon.



Briefly, no ingenuity of argument can cloud the legal principle which underlies this case, that the appellee has the absolute right to require the appellants to account for trust funds whether principal or income as ascertained and determined by a court having full jurisdiction of the subject matter and of the parties; or dispose of the fact that they have failed and refused to perform this duty.

It therefore must be held that the decree of January 10, 1901, never having been modified or reversed is conclusive upon them, and that she is not estopped from asserting her right as beneficiary for life to the interest ordered paid by both decrees.

*Decree of the Probate Court affirmed with costs.*

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KATE HASTINGS vs. MARY NESMITH & another, trustees.

Suffolk. January 24, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Trust, Attempted modification by agreement. Will. Compromise, Agreement of.*

More than a year after a will had been proved and allowed in this Commonwealth, a contest having arisen as to the validity of the residuary clause of the will leaving the remainder of the property of the testatrix to certain relatives, "in trust to devote the income to such charities as they see fit until they can no longer attend to the same," and then to "devote the entire sum, principal and interest, to the same purpose," the heirs at law and next of kin of the testatrix executed an agreement of compromise, confirmed by a decree in another jurisdiction assented to by them, by which it was stipulated that the residue should be paid to two of the trustees named in the will who should pay the net income to one of the next of kin named, quarter yearly, for and during her natural life, "such payments to be deemed a compliance with said trust." The beneficiary for life named in this agreement filed a petition, seeking to be paid the income of the trust fund from the death of the testatrix before the turning over of the fund to the trustees as well as afterwards, under the provisions of Pub. Sts. c. 186, § 24, (R. L. c. 141, § 24.) *Held*, that the compromise agreement in no way modified the will, and was not a will nor an instrument in the nature thereof within the meaning of the statute, so that the provisions of the statute could not apply, and that under the agreement itself the petitioner was entitled to no more; as it gave her only the income of the fund turned over to the trustee under the agreement.



The following statement of the case is taken from the opinion of the court:

This case is before us on a report made by a single justice. From that report it appears that one Katherine H. Taylor, of Washington, District of Columbia, died on December 23, 1896, leaving a last will and testament. On January 27, 1897, a petition for the probate of the will was filed in the Probate Court for Suffolk County in this Commonwealth, in which it was alleged that the testatrix died possessed of goods and estate in said county remaining to be administered. Three years later, to wit, on February 1, 1900, the will was allowed and the persons therein nominated were appointed executors.

The testatrix left as heirs at law and next of kin a nephew, Henry Hastings, a niece, Kate Hastings, and two grandnieces (the daughters of a deceased nephew), Ethel Hastings (now Mrs. Hart) and Henrietta Hastings.

By her will the testatrix left the residue of her estate, subject to a number of pecuniary legacies, to her cousin Mrs. Nesmith and her daughters Mary and Julia (now Julia Ivy) "in trust to devote the income to such charities as they see fit until they can no longer attend to the same, at which time I direct that they shall devote the entire sum, principal and interest, to the same purpose."

Three years after the will was probated here, to wit, on April 18, 1903, Mary Nesmith and Julia Ivy brought a petition in the Probate Court for Suffolk County, alleging that the testatrix by her last will and testament duly proved and allowed in that court on February 1, 1900, gave certain estate in trust for charitable uses and appointed the petitioners trustees thereof; "that said will was modified by a decree of the Supreme Court of the District of Columbia dated July 24, A. D. 1901, . . . and by said decree your petitioners are appointed trustees of said estate"; and praying "that they may be appointed trustees under said will as modified by said decree as aforesaid." No copy of the decree of the Supreme Court of the District of Columbia was in fact recorded in the Probate Court, as alleged in the petition. On this petition a decree was made by the Probate Court here on May 21, 1903, by which, after reciting that it appeared "by said will that said testatrix gave certain estate therein described in



trust for charitable uses and purposes, and that in and by said will modified by a decree of the Supreme Court of the District of Columbia dated July 24, A. D. 1901, . . . said petitioners were named therein as trustees" it was decreed "that said petitioners be appointed trustees as aforesaid."

The proceedings (which are stated in this petition to have resulted in a decree modifying the will of the testatrix), so far as they were put in evidence in the case at bar, consisted of a consent decree, to which was annexed an agreement of compromise on which the consent decree was based.

The agreement of compromise was dated June 20, 1901. It recites that a suit had been brought by the nephew and niece of the testatrix in the Supreme Court of the District of Columbia, in which it was contended (*inter alia*) that the charitable bequest of the residue was inoperative and void, and that a decree had been entered declaring said charitable bequest to be void, from which an appeal had been taken. After this recital the agreement declared that it was agreed that the executors should apply to the Supreme Court of the District of Columbia "for the entry of a decree authorizing and ratifying a compromise of the provisions of said will in accordance with this agreement," and directing them to convert all the property into cash (except wearing apparel, bric-a-brac and similar articles there specified) and after making certain payments, to pay to Willard Howland one sixth of the residue (apparently one half of the one third to which Henry Hastings would have been entitled as heir at law and next of kin), and subject thereto, "to pay over to Mary Nesmith and Julia D. N. Ivy, as trustees under said will, all the rest, residue and remainder of said fund, to be held by them under the trust created in the residuary clause of the will of said testatrix; and said trustees are to be ordered and directed by the terms of said decree to pay over the net income from said trust fund, quarter-yearly, to Kate Hastings, for and during her natural life, free from interference and control of any husband or creditor of hers, for her support and maintenance, such payments to be deemed a compliance with said trust."

The agreement then provides that the decree to be entered shall declare that except "as modified by this agreement," the will of the testatrix is in full force, and that "the administration



of the trust contained in said will, as modified by this decree," shall be "in the Probate Court for the County of Suffolk in the Commonwealth of Massachusetts, and in the courts of said Commonwealth, and governed by the laws of said Commonwealth."

Consent decrees were entered by the Supreme Court of the District of Columbia, on July 24, 1901, and September 27, 1901, which directed the executors to do the things specified in the agreement of compromise, and ended with this clause: "And as modified by said decree, the will of said Katherine H. Taylor and the trust therein set forth are hereby declared to be valid and in full force and effect, and the administration of said trust as modified by this decree shall be in the Probate Court for the County of Suffolk and Commonwealth of Massachusetts, and governed by the laws of said Commonwealth."

As we have said, no copy of this decree was in fact recorded in the Probate Court in Suffolk County when Mary Nesmith and Julia D. N. Ivy asked to be appointed trustees to carry out trusts contained in the will of the testatrix, as "modified by a decree of the Supreme Court of the District of Columbia." The decree was offered in evidence at the hearing before the single justice and admitted as a paper referred to in that petition in which the trusts were described which the petitioners asked to be appointed to carry into effect.

On June 11, 1903, (a few weeks after Mary Nesmith and Julia D. N. Ivy were appointed trustees,) Kate Hastings, the life tenant of the residue under the agreement of compromise, brought a petition in the Probate Court claiming that she was entitled to the income of the residue from the death of the testatrix, to wit, December 23, 1896. On October 22, 1903, a decree was entered by the Probate Court, which, after declaring that "clause 10 of the compromise decree of the Supreme Court of the District of Columbia, now of record in this court, by its terms is substituted for the residuary clause of the will of said Katherine H. Taylor, and that it is to be construed as the purpose of said testatrix," decrees that the petitioner as legatee for life is entitled to the net income from December 23, 1896, and directs the case to be sent to an auditor, to ascertain what part of the fund paid to the trustees by the executors was principal and what income.

From this decree the trustees took an appeal. At the hearing



of that appeal it appeared that the trustees were ready to pay over the income earned by the property, after it was paid to them by the executors as the residue. The single justice ruled that the position of the trustees was right, and reported the case to this court.

*F. H. Stewart*, (*W. J. Desmond* with him,) for the petitioner.

*J. C. Ivy*, for the respondents.

LOURING, J. [After the foregoing statement of the case.] The petitioner's contention that she is entitled to income from the death of the testatrix by virtue of Pub. Sts. c. 136, § 24, (now R. L. c. 141, § 24,) is the natural outcome of the mistake, (on which all proceedings in this matter have been based from the time that the compromise agreement was made,) namely, that such an agreement modifies the will. How it could be thought to modify this will in this Commonwealth is hard to understand. This will was admitted to probate here on February 1, 1900, and the compromise agreement was not made until June 20 of the following year. But apart from that fact such an agreement never is a modification of the will; it is a compromise of the rights of the parties under the will on the one side, and of those who claim that the will is void in respect to the matters covered by the compromise, on the other side. In the case at bar the consent decree to which the compromise agreement was attached having been referred to by Mary Nesmith and Julia Ivy in their petition to the Probate Court to be appointed trustees (inaptly, to be sure) as a paper containing the terms of the trust which was to be administered by them, it was admissible to prove what those trusts were, but not as a modification of the will. It is not a will nor an instrument in the nature thereof within Pub. Sts. c. 136, § 24, (now R. L. c. 141, § 24,) and the petitioner is not entitled to the income from the death of the testatrix by virtue of that act. Neither is she entitled thereto as matter of construction of the compromise agreement as an agreement. What that gives her is the income of the fund turned over to the trustees under the agreement. This is not controlled by the reference made in that agreement to the laws of this Commonwealth.

*Decree of the Probate Court reversed; bill dismissed with costs.*



## NOBLE H. HILL vs. WIRT X. FULLER &amp; others.

Suffolk. January 26, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, &amp; BRALEY, JJ.

*Equity Jurisdiction, Contribution, Laches. Equity Pleading and Practice, Amendment, Costs. Contribution.*

The fact that a portion of a joint debt remains unpaid is no defence to a suit in equity by one of two joint debtors who has paid the principal portion of the debt against the other for contribution, where the collection of the portion of the debt unpaid is barred by the statute of limitations and the creditor has acquiesced in a practical ending of his claim.

Under Chancery Rule 25 of the Supreme Judicial Court a fact occurring after the filing of a bill in equity which makes good the plaintiff's right to relief may be set up by amendment.

If property given by one of two joint debtors is accepted at a valuation as payment of the joint indebtedness that indebtedness is ended, and a bill in equity by the debtor who gave the property will lie against the other for contribution.

Although a plaintiff after filing a bill in equity delays more than six years before filing an amendment which is necessary to complete his right to relief, and delays more than four years after a master's report has been made in his favor before setting it down for confirmation, yet, if the defendant at any time could have brought the case to trial and has failed to do so, he cannot object on the ground of laches to a decree awarding costs to the plaintiff.

The plaintiff in a suit in equity by one of two joint debtors against the other for contribution is none the less entitled to costs because he delayed the filing of his bill four years and eight months.

BILL IN EQUITY, filed July 20, 1894, and amended by leave of court on September 19, 1900, as described below. The bill was against Wirt X. Fuller, individually, and Wirt X. Fuller and Theodore P. Harding, copartners doing business under the name of Fuller, Harding and Company. In this report the word "defendant" is used to designate the first named defendant.

The following statement of the case is taken from the opinion of the court:

This is a bill in equity by which, as amended, the plaintiff seeks contribution from the defendant for a payment made by him on a joint debt. The case was sent to a master, who made a report in favor of the plaintiff. Exceptions were taken by the defendant. These exceptions were overruled and a final decree



was entered, directing the defendant to pay the plaintiff the sum of \$2,601.42, with interest from November 7, 1889, amounting to \$2,292.63, together with costs in the sum of \$51.38. The case is here on an appeal from that decree.

From the master's report it appeared that the plaintiff and the defendant bought and sold stocks for about a year, on joint account, through a firm of brokers by the name of Cordley and Company. Finally, by an order given on December 21, 1888, the balance of stocks carried for them by the brokers was sold. The result was a joint debt due to the brokers from the plaintiff and the defendant, amounting on that day to \$5,444.93.

During and after this period the plaintiff had employed the same brokers to buy and carry stocks for him on his separate account, and on November 7, 1889, there stood to his credit in that separate account \$3,388.33, and two bonds worth \$1,040 each. On that day the plaintiff drew a check for \$2,875 upon the brokers against his individual account, stating that this was at least equal to half the amount then due on the joint account, and tendered it to the brokers in payment of his liability on the joint account, requesting them to look to the defendant for the other half. This the brokers refused to do, saying "that they had applied the plaintiff's private account in part liquidation of the joint account." The amount then due to the brokers on the joint account was \$5,733.81, and the amount due from the brokers on the plaintiff's separate account was \$5,423, taking the two bonds at their market value.

Upon the brokers refusing to take this check and clear the plaintiff from the joint debt, the plaintiff brought two actions against them, one in contract for the \$3,388.33, and the other in tort for the conversion of the two bonds. In both actions the brokers set up these three defences: (1) payment, (2) that it was agreed between the plaintiff and the brokers that "said account of the plaintiff declared on might be held as security for and applied by the defendants in satisfaction of the account of the plaintiff and said Fuller, and that the defendants have so applied the same," and (3) a declaration in set-off for \$5,733.81. The cases were heard by a judge of the Superior Court without a jury, and on November 7, 1892, the judge found for the defendants in both actions.



The bill now before us was filed July 20, 1894.

The report further states that the plaintiff never made any further demand upon the brokers for the money or bonds, the subject of these two actions, and never received them or any part of them; but that on January 1, 1890, and from time to time until July 13, 1894, the brokers delivered to the plaintiff and the defendant monthly statements of their joint account. The last statement (as given in the report) credits the plaintiff and the defendant with a balance of \$6,863.15 on October 1, 1892, to which is added interest for one year, nine months and thirteen days, amounting to \$741.40, making a total of \$7,604.55. Apparently there is a mistake here. On the facts stated in the report the account should have been debited with that amount. On July 13, 1894, the brokers also delivered to the plaintiff a statement of his individual account, in which he is credited with a balance of \$4,333.52 on October 1, 1892, with semiannual coupons on the two bonds, paid in November and May, and also with interest for one year, nine months and thirteen days, making a total of \$5,007.77. To this is added: "Collateral. \$2,000 South Boston Railway five per cent bonds. All held against Fuller and Hill, joint account, showing balance due us in the sum of \$7,604.55."

The master's report concludes as follows: "The foregoing are all the facts which appeared before me tending to show what disposition may have been made of the cash or bonds which stood to the plaintiff's individual credit.

"I find that on the 7th day of November, 1889, there was due Cordley & Co. on joint account, \$5,733.81. I find Cordley & Co. on this day had to the credit of the plaintiff's private account, \$3,388.33 and two South Boston Railway bonds worth \$2,080 in all, the value of \$5,468.33, and if I am warranted as a matter of law on the foregoing facts to find that there had been an application and payment of this sum of \$5,468.33 upon the joint account, I so find.

"I further find that such payment would exceed the plaintiff's share of the joint account in the sum of \$2,601.42, which sum under such circumstances the plaintiff should recover from the defendant Fuller with interest from Nov. 7, 1889.

"If, however, I am not warranted on the foregoing facts to



find that the plaintiff paid said sum of \$5,468.33 to said Cordley & Co., I find that the accounts between the plaintiff and Cordley & Co., and the plaintiff and Fuller and Cordley & Co. have never been settled and adjusted and that the plaintiff has contributed nothing towards the payment of the joint account and under such circumstances I shall find for the defendant Fuller."

*W. M. Stockbridge*, (*G. C. Hodges* with him,) for the defendant Fuller.

*R. Levi*, (*H. L. Baker* & *M. Freiman* with him,) for the plaintiff.

LOBING, J. [After the foregoing statement of the case.] We are of opinion that the finding made by the master was warranted by the evidence.

The defendant has objected that however it may be with the \$3,388.33 due to the plaintiff on his separate account, there is nothing on which a finding can be made that the bonds were applied to the joint debt on November 7, 1889. The defendant relies in support of this objection on the fact that what the brokers are reported to have said on the day when the plaintiff tendered them half the joint debt was that "they had applied the plaintiff's private account in part liquidation of the joint account"; and he argues that all that the word "account" can mean is the \$3,388.33. But if these two bonds were being carried by the brokers for the plaintiff they were technically a part of that account. See in this connection *Covell v. Loud*, 135 Mass. 41; *Weston v. Jordan*, 168 Mass. 401, 404; *Chase v. Boston*, 180 Mass. 458; *Rice v. Winslow*, 180 Mass. 500, 502, 503. In addition to the legal relations of the parties, such an account, in the language of the street, includes the securities which are being carried by the broker for his customer. The report therefore is correct, both in law and in the practice of the street, when it says that the plaintiff dealt with the brokers "in a similar way upon his private account, upon which on November 7, 1889, there was to his credit, subject to his check, in cash, three thousand three hundred eighty-eight and 33-100ths dollars (\$3,388.33) and two South Boston Railway five per cent bonds." If any doubt could be entertained on that point, it is removed by the finding of the judge of the Superior Court in favor of the brokers when the



plaintiff brought an action of trover against them for conversion of these two bonds. The defendant has argued that that finding may have been based on a failure to prove a demand and refusal. But on this report there is no room for that argument. The only defences set up by the brokers were payment and the application by agreement of the separate account to payment of the joint account, and a declaration in set-off. The allegations of the declaration not having been denied stood admitted. R. L. c. 173, § 35. On the facts reported there was no payment apart from the application of the separate account to the joint account; and a set-off cannot be made in an action of tort. The only defence left is that the separate account had by agreement been applied to the joint debt. This must have been held to mean that the whole account, including the two bonds which were being carried by the brokers for the plaintiff had been so applied.

So far the case stated in the report was a clear one. What raises a doubt is the fact that monthly statements of both accounts subsequently were rendered by the brokers which were wrong, if the above explanation is correct. We are of opinion ~~that~~ the master was justified in inferring that in the rendering of these accounts a mistake had been made. It is to be noticed that no such statement was rendered after the bill now before us was filed.

The defendant's next objection is that after the application of the plaintiff's separate account to the payment of the joint debt on November 7, 1889, there was a balance still due on the joint debt of \$265.48; that a bill cannot be maintained for contribution until the whole joint debt is paid, or at any rate unless the plaintiff deducts the amount remaining unpaid, in which connection he refers to *Brinley v. Kupfer*, 6 Pick. 179, and *Williams v. Henshaw*, 11 Pick. 79, 84, 85. Assuming that to have been the situation when the bill was filed in July, 1894, it would seem that the statute of limitations has long since run against the brokers, and on the report the brokers must be taken to have acquiesced in that as the practical ending of all claims on their part, and the action can now be maintained. That an action may be maintained if outstanding debts due the partnership are barred see *Williams v. Henshaw*, 12 Pick. 378, 380. A fact occurring after the filing of the bill which makes good the plain-



tiff's cause of action may be set up by amendment. Chancery Rule 25.

The defendant's next defence is that even if the bonds were accepted in payment by the brokers at their market value, this is not a payment. If property is given and accepted at a valuation as payment of a joint indebtedness, that indebtedness is ended, and an action for contribution can be maintained.

The defendant insists that this is not so because it is held that in an action for contribution the plaintiff does not make out a case by showing that he has given the creditor his non-negotiable note, as was admitted in *Amos v. Bennett*, 125 Mass. 120. See *Davis v. Parsons*, 157 Mass. 584. But the reason for that is because the debt due the creditor is not thereby ended.

Lastly, the defendant asks us to modify the decree as to costs, because the plaintiff delayed four years and eight months before filing the bill now before us, six years and two months before making the amendment on which alone this bill can be maintained, and over four years after the master's report was made before it was set down by him for confirmation. So far as these last two delays go, if the plaintiff was guilty of laches the defendant is open to the same charge. If the defendant had thought that on the whole it was better for him to do so, he could have brought the case to trial at any time. He seems to have preferred the benefit of delay to avoiding the chance of having to pay six per cent interest. We see no reason for differing from the Superior Court in awarding costs to the plaintiff notwithstanding the first delay.

*Decree affirmed with costs.*



**MARGARET G. McGUINNESS vs. ALFRED H. HUGHES.**

Suffolk. January 25, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, &amp; BRALEY, JJ.

*Executor, Qualifications of.*

It cannot be held as matter of law that a person not a lawyer is unfit to act as executor because before the death of the testator he gave him unsound advice in regard to the management and disposition of property which the testator held as trustee under a will or on account of the mere fact that for a long time he knowingly concealed the will of the wife of the testator and all knowledge of it.

MORTON, J. This is a petition for the removal of the respondent as executor of the will of one Austin McGuinness on the ground that the respondent had wrongfully concealed for a long time the will of one Jane McGuinness, wife of said Austin, and all knowledge of the same, and was in other ways unsuitable to discharge the trust. For the purpose of showing that he was in other ways unsuitable to discharge the trust the petitioner offered to show, in substance, that the said Austin McGuinness was trustee under the will of one Mary Condon and, acting under the advice of the respondent, paid over to one of the beneficiaries the entire trust property in disregard of the rights of the other beneficiary. But no claim was made that the respondent, who was not a member of the bar, acted in bad faith or did not exercise his best skill and judgment. The case was heard in this court on appeal by the petitioner from a decree of the Probate Court ordering that the petition be dismissed, and the decree was affirmed except that it was modified by adding thereto that the petition was dismissed without prejudice to the right of the petitioner to renew the same. The petitioner appealed, and the case was submitted to this court upon an agreed statement of facts with power to draw inferences therefrom.

We think that the decree should be affirmed. It cannot be ruled as matter of law that the respondent was unsuitable to act as executor of the will of Austin McGuinness because he had given him unsound advice in regard to the management and disposition of the trust property which McGuinness held under the



will of Mary Condon. That would not of itself necessarily disqualify him from acting as executor of the will of McGuinness. The question of his unsuitableness is to be determined as of the date of the petition for his removal (*Drake v. Green*, 10 Allen, 124), and he may have learned wisdom by experience. Neither does it follow as matter of law that he was unsuitable to discharge the trust because he had knowingly concealed for a long time the will of Jane McGuinness and all knowledge of the same. It is not necessary to consider whether it would make any difference if he had been tried and convicted of the crime of concealing the will of Jane McGuinness, although the fact that he had not been was apparently the reason that led the Probate Court to dismiss the petition for his removal. In the petitioner's offer of proof was an alleged statement by the respondent that he did not propose to bring the will forward as everything was left "just the same as if there was no will." The judge may have found that the concealment of the will by the respondent and all knowledge of it, was due to an honest belief on his part that, under those circumstances, it was not necessary to produce it. If that was so, it cannot be held that the mere fact of concealment without anything more operated as matter of law to disqualify him from acting as executor of the will of Austin McGuinness.

*Decree affirmed.*

*M. L. Jennings*, for the petitioner.

*A. E. Talbot*, for the respondent.

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### GENEVA WAGON COMPANY vs. IDA B. SMITH.

Suffolk. March 7, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Conversion. Sale, Conditional.*

If a mortgagor of a stock in trade includes in the description of the property in the mortgage certain chattels of which the title is in an unpaid vendor under a contract of conditional sale, and acting as agent of the mortgagee retains the key of the building containing the mortgaged property both before and after a



foreclosure sale of the property, this is a conversion by the mortgagee of the chattels wrongfully included and retained by his agent, for which the unpaid vendor may maintain an action of tort against him without a previous demand.

TORT for the alleged conversion of three Geneva wagons. Writ in the Municipal Court of the City of Boston, dated April 25, 1904.

On appeal to the Superior Court the case was tried before *Hardy, J.*, without a jury. It appeared that the plaintiff sold the wagons to Peter H. Henderson and Walter E. Henderson, his son, copartners, doing business as P. H. Henderson and Son, under a contract in writing by which the plaintiff was to retain the title to the wagons until paid for in full, and that the wagons never had been paid for in full, that Walter E. Henderson withdrew from the firm, and that thereafter Peter H. Henderson borrowed money from the defendant, who was his daughter, and gave her a mortgage on all his stock in trade contained in certain buildings in which with other vehicles were the three wagons in question, the son at the request of his father joining in the mortgage, and that the defendant personally took no part in the transaction knowing nothing about such business affairs, but she testified that her father was acting for her in having the mortgage drawn and placed on record. The property was sold by foreclosure under the mortgage, the defendant's father retaining the key to the buildings after as well as before the sale.

The judge, against the objection of the defendant, made the following rulings at the request of the plaintiff: 1. On all the evidence the plaintiff is entitled to recover. 2. The title to the property alleged to have been converted never passed to the Hendersons or either of them, but remained in the plaintiff. 3. On the uncontroverted evidence in this case, and as a matter of law, the mortgage given by Henderson covered the property alleged to have been converted. 4. The act of Henderson in mortgaging the property alleged to have been converted gave the defendant no rights in the property as against the plaintiff. 5. The two Hendersons, father and son, were the agents of the defendant, and she is responsible in law for all acts committed in her behalf in the course of their agency. 6. The acts of the defendant, personally or through her agents, at and subsequent to the mortgagee's sale were acts of conversion. 7. No demand was necessary in this case before bringing action.



The judge found for the plaintiff in the sum of \$190.40 ; and the defendant alleged exceptions.

*T. Spalding*, for the defendant.

*C. T. Cottrell*, for the plaintiff.

HAMMOND, J. The evidence warranted a finding that the title to the wagons was to remain in the plaintiff until paid for in money, and that they never were so paid for ; and therefore that the title never passed to the Hendersons.

Upon the uncontradicted evidence the wagons were included in the mortgage. The language of the mortgage included them, and Henderson, both as mortgagor and as agent for the defendant, the mortgagee, intended that they should be included.

After the mortgage Henderson had the key to the building in which the wagons were kept, and the judge properly could find upon the evidence that he acted as agent for the defendant, so far as respected her supposed rights as mortgagee, and kept them for her under a claim of right inconsistent with the rights of the plaintiff. This was a tortious act on the part of the defendant, and no demand was necessary before bringing the suit. *Baker v. Lothrop*, 155 Mass. 376, and cases cited. We see no error in the rulings given by the judge.

*Exceptions overruled.*

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#### DANIEL J. MC CARTHY vs. INHABITANTS OF DEDHAM.

Norfolk. March 8, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Way*, Defect in highway. *Practice*, Civil, Service of notice in writing, Exceptions.

If, in an action against a town for injuries alleged to have been caused by a defect in a highway, it appears that the notice in writing required by the statute of the time, place and cause of the injury was left by an agent of the plaintiff between eight and ten o'clock in the evening of the last day allowed for service at the house of one of the selectmen of the defendant occupied by him as his home and there delivered to a household servant at the door, and the defendant does not call the servant as a witness or show any reason for not calling her, this will justify a finding that the notice was delivered to the selectman on that evening. In proving the notice to a town under R. L. c. 51, §§ 20, 21, of the time, place and cause of an injury from a defect in a highway, if it is shown that on the



evening of the last day allowed for service such a notice was delivered to a household servant of one of the selectmen at his dwelling, that it was placed somewhere in his personal presence under his control and that he knew it was there, it does not matter that he did not read it or even take it into his hands until three days later.

In an action against a town for injuries alleged to have been caused by a defect in a highway, on an exception to a refusal of the judge to rule that there was no sufficient evidence to authorize a finding that a proper statutory notice was given to the town within the time required, the defendant cannot in argument before this court raise the point that the notice was ambiguous, if the record plainly shows that the ruling requested and refused was intended to mean, not that the notice was deficient in form, but that it was not given in time, and that the judge so interpreted the request.

If, at the trial of an action against a town for injuries alleged to have been caused by a defect in a highway, the defendant did not contend that it was misled by the plaintiff's notice of the time, place and cause of the injury or that the plaintiff had an intention to mislead, the defendant cannot raise that point in argument before this court on an exception to a refusal of the judge to rule generally that the plaintiff is not entitled to recover, especially where the evidence would warrant a conclusion that there was no intention to mislead and that the defendant was not misled.

In an action against a town for injuries alleged to have been caused by a defect in a highway, if there is evidence that the plaintiff was driving under a railway bridge which crossed the highway, that one half of the road was obstructed by dirt and materials placed there in the construction of a sewer, and that the plaintiff's team came in contact with a plank ten inches high, standing on edge and held in that position by dirt around it, projecting into the street so that teams going by would strike it, and if the plaintiff has testified that the road under the bridge was very dark, the questions whether the defect had existed so long that the town by the exercise of reasonable care and diligence might have had notice of it and was guilty of negligence in failing to remedy it, and whether the plaintiff was in the exercise of due care, are for the jury.

TORT for injuries caused by an alleged defect in the easterly side of East Street, a highway in Dedham, near its junction with Avery Street in that town, at a point under a bridge of the New York, New Haven, and Hartford Railroad Company, at five o'clock in the afternoon of December 11, 1901, the alleged defect consisting of a plank extending into the portion of the highway there open for travel. Writ dated September 4, 1902.

At the trial in the Superior Court before *Harris, J.* the defendant at the close of the evidence requested six rulings, of which the judge gave the fifth and sixth as instructions to the jury, and refused the first four which were as follows: 1. Upon all the evidence the plaintiff is not entitled to recover. 2. Upon all the evidence the plaintiff was not in the exercise of due care.



3. There is no sufficient evidence to authorize a finding that proper statutory notice was given to the town within the time required by law. 4. There is no evidence that the town had notice or in the exercise of due diligence ought to have had notice, before the injury to the plaintiff, of the defect relied upon by him, to wit, a plank or planks projecting into a part of the roadway open for travel.

The jury returned a verdict for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

*J. E. Cotter, (J. P. Fagan with him,)* for the defendant.

*J. R. Murphy, (D. W. Murray with him,)* for the plaintiff.

HAMMOND, J. It is stoutly contended by the defendant that there was no sufficient evidence that the statutory notice was given within thirty days. Upon this branch of the case the evidence was conflicting, but it would warrant a finding that between eight and ten o'clock in the evening of January 10, 1902, the last day within which due service of the notice could be made, one Coughlin, acting in behalf of the plaintiff, went to the house of Shriver, one of the selectmen of the defendant town, and "gave the notice to a lady, apparently a domestic who came to the door," and that Shriver occupied the house as his home. Shriver himself testified in behalf of the defendant that he did not see the notice until January 13. The defendant did not call the person into whose hands Coughlin testified he gave the notice, and it does not appear that the defendant could not have called her if it had desired. We think that the jury were warranted in coming to the conclusion that the most reasonable explanation of the evidence in the state in which it was left was that the person who appeared at the door was actually a domestic whose duty it was to deliver speedily to Shriver, her master, such notices as she received at the front door for him; and that Shriver being there then, or shortly afterwards on the same evening, she handed him the message in accordance with her duty. The question was one of fact, and we cannot disturb the finding. See *Shea v. New York, New Haven, & Hartford Railroad*, 173 Mass. 177.

It is also contended by the defendant that the instructions of the judge permitted the jury to find that the notice was properly served, even if Shriver did not receive it on that night. But



while the instructions seem at first sight open to that criticism, we are of opinion that when more carefully considered they are not. The judge evidently was making a distinction between a delivery into the actual hands of the defendant and a delivery upon a table or elsewhere in his presence under such circumstances as to leave the notice within his actual personal control. As thus interpreted, the instructions were correct. It was not necessary that Shriver should have read the notice, or even have taken it into his hands that night. It would have been enough if it was placed somewhere in his immediate personal presence under his control, and he was conscious of it.

It is further suggested that the notice is ambiguous, inasmuch as East Street runs under two bridges some distance apart, and it cannot be told from the notice under which bridge the accident is alleged to have happened. This point does not seem to have been taken at the trial, nor is it mentioned in the charge to the jury, nor involved in any ruling requested by the defendant, unless it is involved in the general request that the plaintiff is not entitled to recover, and in the third request that there is no sufficient evidence to authorize a finding that proper statutory notice was given to the town within the time required. There was no contention by the plaintiff that more than one notice had been given, and the record plainly shows that the point which the defendant intended to make by this third request was not that the notice was not proper in form, but that it was not given in time, and it is equally plain that the judge so interpreted the request. The third request, therefore, must be regarded as in no way raising the question of the form of the notice. And even if the question is involved in the first request, we think that under the circumstances the defendant should be held to a pretty strict rule; and we do not see why, in the absence of any contention by the defendant at the trial that it was misled by the notice or that the plaintiff had an intention to mislead, the judge and jury would not have been warranted in inferring that the defendant did not care to have the judge pass upon that question as a question of law, or the jury as a question of fact. Moreover, while there was no evidence introduced specially to bear on that issue, still we are not prepared to say that the evidence did not warrant a conclusion,



in the absence of any contention to the contrary, that there was no intent to mislead and that the defendant was not misled.

The defect with which the plaintiff's team came in contact was described by the plaintiff as a "two inch plank, eight or ten inches high, standing on edge across the ditch," and by another witness as "a plank which extended across the ditch to guide them in laying pipes, and it stuck out in the passageway so that teams going by would strike it. It was about ten inches high, standing up on end, and held in that position by dirt around it." The reasonable inference is that it had been placed there by the men at work on the sewer before they ceased work for the day, which must have been some time before the accident. If the plaintiff's testimony is to be believed, the road under the bridge was very dark, the westerly half was occupied by the dirt and materials placed there by those who were building the sewer, and only the easterly half of the road was left for travel. The town knew that the sewer was in process of construction, and must be held to have known that the travelled part of the highway was for the time being greatly narrowed and likely to be incumbered with lumber and materials used on the work. In view of all this evidence we are of opinion that the questions whether the defect had existed so long that the town might by the exercise of reasonable care and diligence have had notice of it, and whether it was guilty of negligence in failing to remedy it, were for the jury. The question of the due care of the plaintiff was also for the jury.

*Exceptions overruled.*

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JENNIE FINGER vs. JACOB POLLACK.

Suffolk. March 9, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Libel and Slander. Evidence, Of mental suffering.*

In an action of tort for slander, evidence that the plaintiff cried, that she "looked very bad" and did not sleep as well as before, is admissible to show mental suffering.



TORT for alleged slander in using certain German words set out in the plaintiff's declaration signifying that the plaintiff was a "dirty and homely looking whore." Writ in the Municipal Court of the City of Boston dated July 23, 1902.

On appeal to the Superior Court the case was tried before *Schofield, J.* Against the defendant's objection the judge, upon the question of damages, admitted the testimony of the plaintiff's mother, that after the alleged words had been spoken she had seen her daughter crying, that she "looked very bad" and did not sleep as well as before.

The judge instructed the jury that in an action for slander the jury in assessing damages could consider injury to reputation and mental suffering. The judge further said: "Now, in this case there was some evidence admitted in regard to the plaintiff not sleeping after these words were uttered. The only use that you can properly make of that evidence upon the question of damages is in connection with the injury to the feelings of the plaintiff. Were her feelings injured? If so, to what extent? And evidence of her conduct, or change, after that time is admitted and is competent only upon the question of the injury to her feelings, to enable the jury to say whether there was injury to her feelings, and to what extent they were injured."

The jury returned a verdict for the plaintiff in the sum of \$200; and the defendant alleged exceptions.

*R. Levi*, for the defendant.

*R. H. O. Schulz*, (*D. Mancovitz* with him,) for the plaintiff.

HAMMOND, J. In an action for slander one of the elements of damage is mental suffering. *Chesley v. Thompson*, 137 Mass. 136. Such suffering may be evidenced by the physical appearance or acts of the person suffering. The evidence that the plaintiff cried, that she "looked very bad" and did not sleep as well as before, shows physical conditions which might have indicated mental suffering, and such conditions might be described by any witness who saw them. The evidence was rightly admitted, was carefully limited in the instructions of the judge, and it was the province of the jury to pass upon its weight or significance.

*Exceptions overruled.*



HONORA O'KEEFFE, administratrix, vs. JOHN P. SQUIRE  
COMPANY.

Suffolk. March 9, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BEALEY, JJ.

*Practice, Civil, Exceptions. Negligence, Employer's liability.*

An exception to a ruling, that the plaintiff is not entitled to recover, must be overruled if the ruling can be sustained on any ground, and the defendant's rights are not narrowed by any reason which the presiding judge may have given for his ruling.

If, in an action of tort for personal injuries from alleged negligence of the defendant, the presiding judge orders a verdict for the defendant and states that he does so solely on the ground of the plaintiff's want of due care, this court on exception by the plaintiff may sustain the verdict against him on the ground that there was no evidence of the defendant's negligence whether the plaintiff was in the exercise of due care or not.

If an experienced working foreman is sent with two men under him by a general superintendent to clean up a room which for some months has been unused, his employer owes him no duty to warn him of a defect in the floor of the room from the boards being warped or sprung.

TORT, by the widow of Timothy O'Keeffe, also the administratrix of his estate, for the death and conscious suffering of her husband and intestate alleged to have been caused by an accident sustained by him on September 25, 1901, while in the employ of the defendant. Writ dated January 7, 1902.

At the trial in the Superior Court *Hitchcock*, J. ordered a verdict for the defendant, ruling that the plaintiff was not entitled to recover, on the ground quoted in the first paragraph of the opinion. The plaintiff alleged exceptions.

*P. M. Keating*, (*J. Walsh* with him,) for the plaintiff.

*W. H. Hitchcock*, for the defendant.

HAMMOND, J. At the close of the evidence the presiding judge, in reply to a request of the defendant that a verdict be directed for the defendant, said to the jury: "I am asked by the defendant to rule that upon the whole evidence the plaintiff is not entitled to recover. I make that ruling but base it upon the statement that the plaintiff in this case has not shown that her intestate was in the exercise of due care at the time when he was



injured. You are therefore directed to find a verdict for the defendant." The ruling was that upon the evidence the plaintiff was not entitled to recover. If this ruling can be sustained upon any ground, the exceptions should be overruled. The defendant's rights are not narrowed by the reasons given by the presiding judge.

Whether the question of the due care of the plaintiff was a question for the jury we have not found it necessary to consider, because we are of opinion that there is no evidence of negligence on the part of the defendant. The plaintiff's intestate had been in the employ of the defendant for thirty years. He was a working foreman, having sometimes twenty or thirty men under him. He thus is shown to have been an experienced man. The room, which was three hundred feet in length and the same in width, formerly had been used for "cold storage," but had been unused for several months before the accident. The plaintiff's intestate was ordered by Crowley, the general superintendent, to take two men and go to the room and clean it. We do not understand it to be contended that he did not know that the room had been out of use for some time; and the nature of the order given to him in connection with the general appearance of the room, in which there were "about forty empty boxes" as well as "some shutes or troughs" from eighteen to twenty feet long, must have indicated to him that the room was not then in a condition for use. This is not a case in which a workman is put at his ordinary work in a room under circumstances which justify him in believing that he is expected to attend to the work without paying any particular attention to the safety of his surroundings. The duty here was to clean up a room which for some months had been unused. The plaintiff's intestate was an experienced man, and he had the supervision of the job. Some of the boards of the floor "were warped or sprung into V shape," but no other defect is suggested. Under these circumstances the defendant owed no duty to the plaintiff's intestate to inform him of these defects in the floor. It had the right to assume that in view of the nature of the job, the experience of the intestate, and the obvious condition of the floor, he needed no instructions or warning in this respect. The case must be classed with cases like *Kanz v. Page*, 168 Mass. 217.

*Exceptions overruled.*



HANNAH HOLDEN, administratrix, vs. METROPOLITAN LIFE  
INSURANCE COMPANY.

Suffolk. March 13, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Insurance, Life, Revival.*

The provision contained in R. L. c. 118, § 73, that "Every policy [of life insurance] which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence", does not require a copy of a revival application to be annexed to a policy revived after it has lapsed, and in an action on such a policy the insurance company can put in evidence the application for revival, although not attached to the policy, and show that the warranties contained in the application were broken by the plaintiff so that the revival never took effect.

CONTRACT for \$252 on a policy of life insurance issued by the defendant to the plaintiff's intestate, and alleged to have been revived after it had lapsed. Writ dated October 3, 1902.

At the trial in the Superior Court before *Wait, J.* the plaintiff asked the judge to rule as follows: 1. The granting of the application for a revival of the policy restored the insured to all the rights he acquired upon the date the policy was issued, subject only to such conditions as may appear in the application and instrument reviving the policy. 2. The application for revival of the lapsed policy not having been attached to the policy is not admissible as evidence, and the jury must disregard it. 3. The revival of the policy is a revival *ab initio* of all the plaintiff's rights.

The judge refused to rule as requested, and ruled "that the application for revival is not itself a policy of insurance, and the evidence, uncontradicted evidence, shows that prior to the application for revival the assured had been rejected for insurance in other life insurance companies. That the warranties contained in the revival were therefore violated, and the revival did not take effect." He ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*D. V. McIsaac*, for the plaintiff.

*G. W. Cox*, for the defendant.



HAMMOND, J. The policy having lapsed, the insured, desiring to have it revived, made an application for that purpose, and upon that application it was revived. In this application there was a warranty that the insured had not been rejected by other insurance companies.

At the trial the defendant showed by uncontradicted evidence that the insured, previous to taking out the policy, had been rejected by other insurance companies; and it contended, among other things, that the warranty had been broken and consequently that the contract of revival was void. To this, so far as respected the application for revival, the plaintiff contended that this application should have been attached to the policy, and that not having been so attached, it could not be admitted in evidence, nor could the evidence of the breach of warranty be admitted. The judge admitted the application and the evidence as to the breach of warranty, ruled that "the application for revival is not itself a policy of insurance" and that inasmuch as the uncontradicted evidence showed "that prior to the application for revival the assured had been rejected for insurance in other life insurance companies, . . . the warranties contained in the revival were therefore violated, and the revival did not take effect"; and having so ruled, directed a verdict for the defendant.

Although not stated with much precision, the ruling of the judge in substance was that R. L. c. 118, § 73, did not require a copy of the revival application to be annexed to the policy. We are of opinion that the ruling was correct.

That section provides that "Every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence."

An inspection of this policy shows that it does not contain a reference to the application of the insured, either as a part of the policy or as having any bearing thereon. It is true that there is a statement upon the policy that having lapsed it is revived upon certain warranties contained in the revival application, but this relates simply to the terms of the revival, and not to the terms



of the original policy. The terms of the policy as such remain as before. The language of the statute plainly has reference to an application upon which the original policy is issued, and not to any contract of revival. This view of the statute is further confirmed by the next clause in the same section, which provides that "each application for such policy shall have printed upon it in large bold-faced type the following words: 'Under the laws of Massachusetts, each applicant for a policy of insurance to be issued hereunder is entitled to be furnished with a copy of this application attached to any policy issued thereon.'" The defendant does not seek to avoid the policy for any violation of its provisions, but seeks to avoid the contract of revival upon the ground that it was void from the beginning, and the policy never was in law revived.

Since the policy had lapsed and the revival was void, the judge rightly ordered a verdict for the defendant.

*Exceptions overruled.*

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THOMAS B. FLYNN vs. HENRY S. COOLIDGE.

Suffolk. March 14, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Evidence, Declarations of deceased persons. Malicious Prosecution.*

To make the declaration of a deceased person admissible under R. L. c. 175, § 66, the party offering it must satisfy the presiding judge not only that the statement was made in good faith but that it was made before the commencement of the action, and where this is not clear and no offer is made to show it, the judge is warranted in excluding the evidence.

In an action for alleged malicious prosecution in causing the arrest of the plaintiff for larceny after the issuing of a warrant to search the plaintiff's premises, the defendant, for the purpose of meeting the charge of malice, offered to show by the police officer who served the search warrant, that after the witness had searched the plaintiff's premises and had found that most of the articles mentioned in the warrant had been returned, the defendant inquired of the witness whether he ought to continue under the warrant, and also asked the witness's advice as to whether he should proceed under the warrant. The evidence was excluded. *Held*, that no error appeared in the exclusion of this evidence, as the defendant's questions to the officer had in themselves no bearing on the issue of malice and it did not appear what answer the officer made to them.



TORT for alleged malicious prosecution in causing the arrest of the plaintiff for larceny after the issuing of a warrant to search the plaintiff's premises. Writ dated May 17, 1900.

At the trial in the Superior Court before *Bell, J.* the defendant asked for seven instructions to the jury, of which the judge gave the first, fifth and sixth, and refused to give the following:

"2. There is no evidence that the defendant acted with malice and the plaintiff cannot recover.

"3. There is no evidence that the defendant acted without probable cause and the plaintiff cannot recover.

"4. If the officer serving the search warrant found on the premises of the plaintiff any of the property of the defendant mentioned in the search warrant, it is presumptive evidence that the plaintiff had probable cause for making the complaint of larceny."

"7. On all the evidence the plaintiff cannot recover."

The jury returned a verdict for the plaintiff in the sum of \$827; and the defendant alleged exceptions, that to the refusal of the fourth ruling requested not being argued.

*F. H. Williams*, for the defendant.

*J. J. O'Connor*, (*W. J. Kelly* with him,) for the plaintiff.

HAMMOND, J. 1. The questions whether there was probable cause and malice properly were submitted to the jury, and the refusal to give the second and third rulings requested was correct. The exception to the refusal to give the fourth ruling requested is not argued by the defendant, and in view of its nature, we consider it waived. We see no error in the manner in which the court dealt with the requests.

2. The plaintiff, who testified that he was a stable keeper, claimed as an element of damage that by reason of the malicious prosecution and the consequent injury to his reputation he had been unable to hire a stable in which to carry on his business and therefore lost the patronage of his former customers. In support of this claim he introduced evidence tending to show that he tried to hire a stable from one McCleary, and that McCleary refused to let it to him, and, when pressed to give his reason, said: "Because Mr. Coolidge had you [the plaintiff] arrested and you are branded as a common thief."

The defendant called as a witness one Griggs, and offered to



show by him that McCleary, who had died before the trial, told the witness that his reason for refusing to let the stable to the plaintiff was that he "objected to having a public stable kept there." The plaintiff was contending before the jury that the defendant's act was the cause of his inability to hire McCleary's stable, and the real reason of McCleary's refusal therefore became material. If McCleary had been a witness he could have testified as to the reason. The statement made to Griggs tended to show that the plaintiff was wrong as to the reason of McCleary's refusal. The defendant contends that it was admissible under R. L. c. 175, § 66, (see *Dixon v. New England Railroad*, 179 Mass. 242,) but the difficulty about this is that even if it be assumed that the statement was made by McCleary in good faith, the presiding judge may have failed to find that it was made before the commencement of this action. The offer was to show that the statement was made after the first interview between the plaintiff and McCleary. The plaintiff was arrested on May 5, 1900, and acquitted two days afterwards. The present action was begun on May 17, 1900. In the absence of any offer to show that the statement was made before the commencement of this action, the judge was warranted in excluding the evidence. The offer was not broad enough to bring the statement within the statute.

3. The evidence which was offered to show that after most of the articles named in the search warrant had been returned the defendant asked the police officer whether he, the defendant, ought to continue under the warrant, and also asked the officer's advice as to whether he should proceed under the warrant, was rightly rejected. There is nothing in the questions themselves which bears upon the question of malice, and it does not appear what the answer of the officer was.

*Exceptions overruled.*



## LEMUEL CROSSMAN &amp; another vs. CHARLES A. GRIGGS.

Norfolk. March 14, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; HAMMOND, JJ.

*Lis Pendens.*

Where a plaintiff, after bringing an action at law, begins by writ a suit in equity involving the same claims, and is allowed to amend his suit in equity into an action at law in which he obtains a finding, and at first is awarded the full amount of his claim, but later is allowed to discontinue his action as to certain items which are in excess of the *ad damnum* of his writ, and the finding is reduced to the sum named in the writ, the plaintiff still may recover in his first action at law the items as to which he has discontinued his second action amended from the suit in equity.

CONTRACT for certain amounts of money. Writ dated August 20, 1898.

On the date of the writ the plaintiffs attached real estate of the defendant and placed keepers in possession of personal property. The keepers remained in possession until August 30, 1898. The writ was returned to the court on its return day, without service upon the defendant, but on the return day a declaration was filed and the case was entered. In December, 1903, no further proceedings having been had, an order was issued for further service upon the defendant, and service thereupon was made in accordance with the order.

On August 30, 1898, the personal property attached by the plaintiffs under their writ in this action was again attached by a writ dated August 30, 1898, having an *ad damnum* of \$25,000, which last named writ was taken out in a suit in equity begun in the Superior Court for the County of Norfolk. See *Crossman v. Griggs*, ante, 156.

The bill in equity was prosecuted through its various stages to consideration by this court, where it was ordered dismissed with costs to the defendant. After the rescript ordering that the bill be dismissed was entered in the Superior Court and before a decree in extended form was spread upon the records, the plaintiffs by leave of court amended the suit in equity into



an action at law and filed a declaration in that case, including among other things the counts and claims involved in this action. That case, as amended into law, came up before *Bell, J.*, sitting with a jury, but, as there was no dispute in regard to the facts, the jury were not impanelled and, after certain arguments on questions of law, the judge found for the plaintiffs in the sum of \$28,949.88, on all the counts in their declaration. This finding being in excess of the *ad damnum* of the writ in the suit in equity amended into law, the plaintiffs, before judgment, by leave of court voluntarily discontinued as to certain counts of their declaration, and the judge thereupon amended his findings by omitting therefrom the amounts claimed on the counts as to which the plaintiffs had discontinued. To this discontinuance and to the amendment of the finding of the judge the defendant made no objection by exception or appeal or otherwise.

The plaintiffs thereupon discontinued in this action begun on August 20, 1898, as to certain items which were included in the amended finding of the judge in the suit in equity as amended into law. Thereafter in the declaration in this action there remained certain counts which originally had been included in the declaration in the action amended from equity, but which because of the discontinuance in that action had not been included in the amended finding therein.

Thereafter, the defendant having filed an answer, this action came on for trial before *Bond, J.* The plaintiffs offered evidence which tended to prove the facts necessary to establish the counts remaining in their declaration, and the defendant, not disputing these facts, offered in defence the proceedings in the equity suit which had been amended into law, and requested the following rulings:

"First. That the plaintiffs cannot maintain this action in this form at this time and in this manner, because there is an action already pending between the same parties for the same cause concerning the same subject matter in the same court as appears in case No. 590, *Crossman et al. v. Griggs*, on the record of this court.

"Second. That the plaintiffs cannot maintain this action because, having joined the counts relied on herein with other counts in an action brought in this court after the finding of



this action and having obtained finding thereon and voluntarily discontinuing as to the counts alleged on in this action, their proper remedy was to have moved for an increase of the *ad damnum* in case No. 590, as above referred to instead of discontinuing as was done, and because of the rule against the multiplicity of suits.

"Third. Because it appears that all the issues joined in this case have been adjudicated in case No. 590 on the record of the court above referred to."

The judge refused to rule as requested. He found for the plaintiffs in the sum of \$4,748.99; and the defendant alleged exceptions.

*V. Goldthwaite*, for the defendant.

*J. B. Studley*, (*G. R. Nutter* with him,) for the plaintiffs.

KNOWLTON, C. J. The first request for a ruling was rightly refused. The cause of action referred to was not then involved in the other action. The counts presenting it in that action had been discontinued by leave of the court, without objection by the defendant, and the findings in that case were upon the other counts which did not include this cause of action. For the same reason the second and third requests for rulings were refused rightly.

*Exceptions overruled with double costs.*

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AGNES C. BYRNE, administratrix, *vs.* LORING N. FARNUM.

Essex. March 14, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence, Employer's liability. Dynamite.*

*Hoe v. Boston & Northern Street Railway*, 187 Mass. 67, affirmed.

KNOWLTON, C. J. This is an action to recover for an injury suffered by the plaintiff's intestate from an explosion of dynamite while he was in the service of the defendant. The accident occurred on February 14, 1902, and was the same referred



to in the three first cases which appear under the name *Hoos v. Boston & Northern Street Railway Co.* 187 Mass. 67. The only question raised in the present case is whether there was evidence to warrant a verdict for the plaintiff. The facts reported are substantially the same as those in the former cases, and the entry therefore must be

*Judgment for the plaintiff.*

*J. P. Sweeney*, for the plaintiff.

*J. G. Walsh*, for the defendant.

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**MAY E. WILLWORTH vs. BOSTON ELEVATED RAILWAY  
COMPANY.**

Suffolk. March 16, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence. Elevated Railway.*

It is no evidence of negligence of an elevated railway company toward a passenger, that there is a space of from three to four inches between the floor of the doorway at which the passengers alight from each car of its trains and the platform to which they pass.

It is no evidence of negligence of an elevated railway company toward a passenger, that while the passengers alighting from a greatly crowded car forming part of one of its trains were passing over an open space of from three to four inches between the car and the platform the guard on the platform told them "as he usually does" to "step lively" or "move quickly."

TORT by a passenger on an elevated train of the defendant for injuries sustained while alighting at the defendant's station at Dudley Street in Boston at half past six o'clock in the evening of January 25, 1902, from the plaintiff's foot and leg going down between the car and the platform. Writ dated March 22, 1902.

In the Superior Court *Sherman*, J. ordered a verdict for the defendant, and reported the case for determination by this court. If the ruling was correct judgment was to be entered on the verdict. If it was erroneous, by agreement of counsel judgment was to be entered for the plaintiff in the sum of \$500 and costs.



*C. G. Metzler*, (*D. B. Ward* with him,) for the plaintiff.

*H. Bancroft*, for the defendant, was not called upon.

KNOWLTON, C. J. The plaintiff was a passenger on the defendant's elevated railway, and in passing from the car to the platform at a station, she got her foot through the space between the car and the platform and was injured. The car was constructed according to the description in *Hannon v. Boston Elevated Railway*, 182 Mass. 425, with a wide sliding door on the side, half way between its ends, through which the passengers passed out of the car, and with doors at the ends through which others entered. The platform was on a level with the floor of the car. The plaintiff testified that the space between the car and the platform was from three to four inches in width. The defendant offered evidence which was uncontradicted, that the space between the car and the platform was three inches wide when the car stood absolutely vertical, and that in the ordinary operation of the train there might be an oscillation from side to side of two inches, causing the space between the car and platform to vary from one to five inches in width, according to the manner of the tilting of the car. The defendant offered evidence that this oscillation was a necessary incident to the operation of the train, and that it would not be safe to have the platform of the station any nearer than this was to the side of the train. There was testimony that the car was very much crowded, and that the guard on the platform told the passengers, "as he usually does," to "step lively," or "move quickly."

The plaintiff testified that she was passing out in a crowd so great that she could not turn around, and "went out practically sidewise instead of going straight forward," and that in this way her foot and leg went down between the car and the platform, nearly to the knee. This was substantially all the evidence.

There is nothing to show negligence of the defendant in the construction of the car or the platform. The jury would not have been warranted in finding on this evidence that a safer or better way of passing from the car to the platform could have been provided. There was no suggestion, either in evidence or in the argument, of any safer practicable method of passing, that would enable the defendant to give the people rapid transit. No



intelligent person could fail to know that the car and the platform were separate and independent structures, and that necessarily there must be a space of greater or less width between them. No one reasonably could expect that the space would be less than three or four inches. In *Ryan v. Manhattan Railway*, 121 N. Y. 126, it appeared that the plaintiff suffered in a similar way, and that the space between the car and the platform was much greater than in this case, the station being located and the platform built on a curve. It was held that there was no evidence of negligence on the part of the defendant. See also *Welch v. Boston Elevated Railway*, 187 Mass. 118.

It was not negligence for the guard on the platform to ask the passengers to move quickly. *Hannon v. Boston Elevated Railway*, *ubi supra*. The nature of the business in which the defendant is engaged and the convenience of its passengers who cannot afford an unnecessary loss of time justify efforts to make the transfers at stations quickly.

Nor is it shown that the defendant was in fault in not taking measures to prevent the passengers from crowding in passing out at this broad side door. There was no reason to expect anything unusually dangerous on this occasion. It does not appear that the passengers were disorderly, or that they were doing anything that ordinarily would call for interference by the railroad company. Indeed, the plaintiff seems to have been familiar with the ordinary method of alighting, and with such dangers as attended it, for she testified that the guard "hollered out as he usually does." She must have known that there was an open space between the car and the platform, over which she must pass, and in the exercise of due care, she should have directed her steps accordingly.

We are of opinion that the ruling was right.

*Judgment on the verdict.*

NOTE. — The following cases from the same county were decided on the same day as the foregoing case, the same justices sitting.

ETTA M. FIELD vs. BOSTON ELEVATED RAILWAY COMPANY.  
GEORGE H. FIELD vs. SAME.

TWO ACTIONS OF TORT, one by a girl, about seventeen years of age when injured, a passenger on an elevated train of the defendant, for injuries sustained while alighting at the defendant's subway station at Park Street in



Boston on the morning of December 9, 1901, and the other by the father of the plaintiff in the first case for loss of her services and earnings, and for expenses incurred for nursing and medical attendance. Writs dated January 20, 1902.

In the Superior Court the cases were tried together before *Hardy, J.* The plaintiff in the first case testified that the train was very crowded, "jammed full", and that there was a crowd standing in the car. She described the accident as follows: "When we got right near Park Street, I got up to go to the door, and those that were at the door of course moved out first, and the crowd in back was pushing, and the guard said, 'Step lively, please'; I stepped out, and as I stepped out the crowd turned me around and my left foot went down between the train and the platform, and my right foot went on the platform." She further testified that "she went down the full length of her left leg and struck." Other evidence is mentioned in the opinion.

The judge ordered a verdict for the defendant in both cases; and the plaintiffs alleged exceptions.

*W. E. Collins, (W. L. Collins with him,) for the plaintiffs.*

*E. P. Saltonstall & S. H. E. Freund, for the defendant, were not called upon.*

KNOWLTON, C. J. The first of these cases cannot be distinguished from *Willworth v. Boston Elevated Railway*, ante, 220, and the decision of the second depends upon the same facts. The plaintiff in the first case had ridden on the elevated railway ten or a dozen times before the accident, and, although the car was crowded and she said the passengers were rushing to get out, she testified that "there was the same rush that would ordinarily occur in an elevated train." The evidence on the part of both the plaintiff and the defendant tended to show that the greatest space between the car and the platform of the station was not more than three and five eighths inches. There was no evidence of negligence on the part of the defendant.

*Exceptions overruled.*

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## ROBERT H. GARDINER & another vs. STREET COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. March 16, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Contract, Validity. Municipal Corporations. Tax, Assessments for benefits. Certiorari.*

Whether a statement contained in an invitation for proposals to construct a street for a city, that the proposal of a bidder who will pay the full trade union scale of wages may be accepted in preference to that of a bidder who will pay wages according to a lower scale, and a clause in a contract for such construction that the contractor shall pay the full trade union scale of wages to his employees, make such a contract invalid even if a statute purports to authorize it, is an open question in this Commonwealth.



Under St. 1902, c. 527, which authorized the assessment within a year from the passage of that act of betterments for improvements completed by the city of Boston within six years from that date and was intended to authorize assessments for expenses wholly or in part illegal when incurred, an assessment, upon estates specially benefited to a greater amount than the assessment, is valid if it is less than one half of the amount legally expended for land damages, and in such a case it is immaterial whether a part of the additional expense for construction was incurred illegally or if so whether the acts illegal when performed were of a kind which the Legislature might have authorized.

Citation of cases deciding that on a petition for a writ of certiorari the petitioner cannot rely on matter not disclosed by the record.

KNOWLTON, C. J. This is a petition for a writ of certiorari to quash an assessment of betterments by the board of street commissioners, for the widening, location and construction of Charlestown Street in Boston. The only grounds on which the petitioners now contend that the assessment should be quashed are that the invitations for the proposals to do the work contain a statement that "the proposal of a bidder who will pay the full trade union scale of wages to his employees may be accepted in preference to a bidder who will pay a lower scale of wages," and that the contract for the construction of the street contained a clause that the contracting company shall "pay the full trade union scale of wages to its employees."

It is contended that this was an illegality that could not have been authorized by the Legislature if a statute had been enacted purporting to authorize it. We do not intimate that this contention is well founded. The question presented by it is quite different from that decided in *People v. Coler*, 166 N. Y. 1, by a divided court.

We are of opinion that the validity of the assessment is well sustained without reference to the decision of this question. The board of street commissioners were acting under the St. 1902, c. 527, which was considered at length in *Warren v. Street Commissioners*, 187 Mass. 290, and again in the *New England Hospital for Women & Children v. Street Commissioners*, ante, 88. As was pointed out in *Warren v. Street Commissioners*, it was enacted to authorize assessments in cases in which the cost had been incurred illegally, either wholly or in part. In reference to assessments for expenses incurred illegally, it was said that "If the defect that makes the assessment void is an irregularity or error which the Legislature might have authorized, or an



omission of that which it might have dispensed with by a proper statute, it is not beyond the power of the Legislature to correct the error by a subsequent act." The statute was to continue in force, as an authority for making assessments, only for a year from the date of its enactment. It stands by itself on peculiar grounds.

In the present case the amount expended for land damages was \$662,102.74, and the total expense for construction was \$34,570.42. The board of street commissioners adjudged the benefit to the estates on Charlestown Street from the public improvement to be \$212,229, and this amount they assessed upon these estates. Subsequently, after a hearing upon petitions for a revision of the assessments, they reduced them so that the total amount assessed was only \$149,231.77. They say in their return that they have no knowledge as to the legality or illegality of the doing of the work, and have not inquired into the detail of the expenditures for construction, and they ruled that they were not required by law so to inquire.

Inasmuch as the expenditure for land damages was more than three times the amount assessed for benefits, the validity of the assessment is not affected by an irregularity or illegality, if there was any, in the expenditure for construction. Under this statute, enacted to authorize assessments in spite of illegality, we are of opinion that, if the board assessed less than one half of the amount legally expended for land damages upon estates specially benefited to an amount greater than the assessment, it is immaterial whether a part of the cost of construction was incurred illegally, and whether, if there was illegality, it was of a kind that the Legislature might have authorized. The expenses legally incurred were far more than enough to sustain the assessment.

In this view of the case it is unnecessary to consider matters of procedure touching the question whether it is open to the petitioners to prove the averments on which they rely. See *Ward v. Newton*, 181 Mass. 432; *Janvrin v. Poole*, 181 Mass. 463.

*Petition dismissed.*

*F. R. Bangs*, for the petitioners.

*T. M. Babson*, for the respondents.



## ELIZABETH B. NEWTON vs. CITY OF NEWTON.

## JOSEPH GREEN vs. SAME.

Middlesex. March 17, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Damages, For property taken under statutory authority. Eminent Domain. Evidence, Admissions and confessions.*

If a city, authorized by a statute to take land in fee simple or otherwise for the purpose of improving watercourses within its territory, in altering the course and deepening the channel of a certain brook and constructing it as an open brook with low walls, sloping sides and a paved bottom, takes the land through which the brook runs and orders the owners within ten days to take off "fences, trees and other property which may obstruct the construction of said improvement," without declaring that a fee is necessary for the purposes of the taking, only an easement is taken.

The answer of a city to a petition for damages for the taking of the petitioner's land for the improvement of a certain brook in admitting that lands were taken for that purpose does not admit that the lands were taken in fee.

TWO PETITIONS, filed October 7, 1902, for damages from the taking of land of the petitioners by the city of Newton under St. 1898, c. 63, for the improvement of Hammond Brook as stated in the opinion.

In the Superior Court the cases were tried before *Wait, J.* The judge instructed the jury that in each case the defendant took not a mere easement but the fee in the petitioners' land. The jury returned verdicts for both petitioners, in the first case in the sum of \$886.32, and in the second case in the sum of \$821.24, both sums including interest from the date of the taking. The respondent alleged exceptions.

*W. S. Slocum*, for the respondent.

*J. W. Allen*, (*E. E. Kent* with him,) for the petitioners.

KNOWLTON, C. J. The city of Newton, acting under the St. 1898, c. 63, took lands of the respective petitioners for the purpose of improving one of the brooks in the city. The first section of this statute is as follows: "The city of Newton for drainage purposes or for the protection of the public health, or both, may within the limits of said city, from time to time, im-



prove the brooks and natural streams flowing in or through said city or any portion thereof, by widening the same, removing obstructions in or over the same, diverting the water, altering the courses or deepening the channels thereof, and the more effectually to make said improvements may take land in fee simple or otherwise on either side of the present channels of any such brook or natural stream, or may take land to form new channels into which said waters or any surface waters may be diverted within the limits of said city." The question is whether the taking was of a fee, or only of an easement in the land.

Under the statute the city could take land only to make these improvements, and only such an interest as was reasonably necessary for that purpose. Because it might be doubtful in many cases whether a fee was necessary the statute authorized the city to determine the question, and take a fee whenever it deemed so large an estate necessary to the proper construction and maintenance of the improvement. In taking the lands of the petitioners the city did not in terms state how large an estate was taken. The order adopted by the board of aldermen, which constitutes the taking, recites that public convenience and necessity require the improvement of Hammond Brook in the manner referred to in the statute, whose language is followed in this part of the order, and that the taking of the several parcels of land described is necessary, and that notice was given and a public hearing had, and then orders that this brook be improved "as aforesaid by widening the same, removing obstructions in or over the same, diverting the water, altering the course and deepening the channel thereof and taking land therefor on the sides of the present channel and for forming a new channel into which said waters and any surface waters may be diverted within the limits of said city as shown on said plans and profiles and described, and to be constructed and completed as follows," etc. Then follows a "Description and Method of Construction" which shows an open brook with low walls and sloping sides and a paved bottom, and gives its location with courses and distances. It is further "Ordered, that the following described parcels of land be and the same are hereby taken for the purposes aforesaid." We next have a description of the lands taken, with an assessment of damages, and an order allowing the owners ten days to take off



"fences, trees and other property which may obstruct the construction of said improvement."

The taking of the land is only "for the purposes aforesaid." The city did not assume to determine that the taking of the fee was necessary. In the absence of such a determination, and with a statute which does not indicate that the taking is to be of a fee unless there is such a determination and an order accordingly, we are left to apply the common rule that, "when private property is taken in the exercise of the right of eminent domain, the taking must be limited to the reasonable necessities of the case, so far as the owners of the property taken are concerned." *Rockport v. Webster*, 174 Mass. 385, 390. In *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361, 365, this rule is stated as follows: "The uniform rule in Massachusetts is, that when the Legislature delegates to a corporation or person the power to take land of another in the exercise of the right of eminent domain, such corporation or person takes only such estate in the land taken as is necessary to carry out the purposes for which it or he is permitted to take it. This rule is constantly applied in the cases of highways, turnpikes, railroads, canals, aqueducts, sewers, and other like cases. *Harbuck v. Boston*, 10 Cush. 295. *Clark v. Worcester*, 125 Mass. 226. It is not necessary that the defendant should have a fee to enable it to carry out all the purposes of the act, and it therefore took only an easement, and the fee remained in the original owner. *Aetna Mills v. Brookline*, 127 Mass. 69-72." See *Boston v. Brookline*, 156 Mass. 172, 176; *Newton v. Perry*, 163 Mass. 319; *Conklin v. Old Colony Railroad*, 154 Mass. 155. In *Dingley v. Boston*, 100 Mass. 544, and *Page v. O'Toole*, 144 Mass. 303, the purposes of the Legislature were broad, and the language of the respective statutes was materially different from that in the present case.

It is obvious that an easement in the land is all that is necessary to enable the city to complete and maintain the improvement. A construction of the statute which would leave the petitioners with no access to the waters of the brook and would create an impassable barrier between lands on opposite sides of the brook would be unreasonable.

That part of the order which fixed the time within which the petitioners might remove their property mentioned only property



which might "obstruct the construction of said improvement," and implied that other property, if there was any, lawfully might remain without change of ownership. The respondent's admission in its answer that there was a taking of lands is not an admission that the fee was taken, and the question raised at the trial is open under the pleadings.

*Exceptions sustained.*

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COMMONWEALTH vs. ABE STRAUSS.

Plymouth. March 20, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Unfair Competition. Sale.*

R. L. c. 56, § 1, making it a criminal offence to impose a condition in the sale of goods "that the purchaser shall not sell or deal in the goods . . . of any other person", does not prohibit a sale of goods by a manufacturer with an agreement to give a reasonable discount at the end of a certain period if during that period the purchaser has not dealt in goods of the same kind made by any other manufacturer. Whether, if the original price was made so high and the discount so large as virtually to require the buyer not to deal in the goods of others, the sale would come within the terms of the statute was not considered, nor was the question of the constitutionality of the statute.

KNOWLTON, C. J. Section 1 of chapter 56 of the Revised Laws is as follows: "A person, firm, corporation or association of persons, doing business in this Commonwealth, shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of persons; but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares or merchandise. Whoever, as principal or agent, violates the provisions of this section, shall be punished for the first offence by a fine of not less than fifty nor more than one hundred dollars; and for each succeeding offence by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprison-



ment." An indictment was found against the defendant under this section, charging him, in five counts for as many different offences, with having made it a condition of the sale of certain merchandise, to wit, the plug tobaccos of the Continental Tobacco Company, that the purchaser should not sell nor deliver any of certain merchandise, to wit, the plug tobaccos of any other person, firm or corporation, or association of persons, etc. The defendant was a salesman employed by the Continental Tobacco Company to solicit orders from purchasers and forward them to the office of his employer in New York City to be filled. The evidence tended to show that he sold tobacco to the persons mentioned in the indictment as purchasers, at list prices, agreeing to give them a trade discount of two per cent, and if the bill was paid within ten days a further cash discount of two per cent, and if they handled the plug tobaccos of the Continental Tobacco Company exclusively, that is, handled and dealt in no plug tobacco made by any manufacturer other than the Continental Tobacco Company, to give them, at the expiration of a stated period, a further amount equal to six per cent of the amount of their purchases during such period. The defendant introduced no evidence. Various requests for instructions to the jury were made by the defendant, which we need not consider in detail. The presiding judge refused these requests, and, subject to the defendant's exception, instructed the jury as follows: "Upon all the evidence if you are satisfied that the defendant, acting for the Continental Tobacco Company, offered for sale to the person or concern named in either count of the indictment the plug tobacco made by the Continental Tobacco Company upon more favorable terms if such person or concern should not sell or deal in the plug tobacco of any other person, firm, corporation, or association of persons, it will be your duty to find the defendant guilty under any such count." The jury returned a general verdict of guilty.

The first question is whether this instruction was correct. The statute was evidently aimed at unfair competition designed to crush rivals and to create a monopoly. It is conceivable that a great proprietor, manufacturing and selling a certain kind of goods which are in great demand in the market, might largely increase his own trade and largely diminish that of his rivals by



refusing to sell any of his goods to dealers, unless they would agree not to sell similar goods produced by others. There is strong ground for an argument that, at least as to certain classes of goods, such a kind of competition may be forbidden by statute constitutionally. On the other hand, the right to make proper contracts for the advancement of one's interests is important, and is protected by the Constitution of the Commonwealth and the Constitution of the United States.

This is a highly penal statute, and accordingly it must be construed strictly. It forbids requiring, as a condition of a sale of goods, that the purchaser shall not sell goods manufactured by another. It is intended to make it impossible for a seller to say to an ordinary purchaser who buys to sell again, "You cannot buy my goods except upon condition that you will not sell goods obtained from others. If you sell like goods manufactured by others, you cannot have any of mine." This is very different from saying: "I am ready to sell you my goods freely, and you may sell the goods of others as much as you choose; but I will make you a reasonable and proper inducement to increase the sale of my goods, by giving you a discount from the regular price, if you will sell mine exclusively." We can conceive of cases in which the former method of dealing would be unfair competition, while the latter would be fair competition.

The language of the statute does not include the latter. It refers to a sale, the condition of which is that there shall be no sale of the goods of others. It refers to dealings which make it impossible for one to buy certain goods to sell again, unless he agrees at the same time to sell these exclusively. Such an absolute agreement on the part of the purchaser is a condition precedent to the consummation of a prohibited sale. There is no prohibition of sales giving full liberty to the purchaser to sell the goods of others, and offering an inducement at the same time, by way of discount from the list price, to sell the seller's goods exclusively.

We are of opinion that the instruction enlarged the application of the statute beyond its true meaning, and was, therefore, erroneous. In order to convict the defendant under this interpretation of the law, the jury were not required to go further than to find that he offered terms somewhat more favorable to



one who would sell his employer's goods exclusively than to one who would give the defendant's employer only a part of his trade. We think that such arrangements are not uncommon, even where there is no thought of obtaining a virtual monopoly.

If the question left to the jury had been whether, under the guise of giving more favorable terms to those who would sell his employer's goods exclusively, the defendant had made the price to those who sold the goods of others so high in comparison with that to those who sold only his employer's goods, as virtually to make it prohibitive of purchases except by those who sold only his employer's goods, the case would be very different. Whether such an arrangement would come within the terms of this criminal statute we do not decide.<sup>1</sup>

The counsel for the defendant and the district attorney have argued with much elaboration and ability the question, whether the statute, under different possible constructions of it, is constitutional. Some of the questions discussed have given rise to much difference of opinion in other courts. In the view that we have taken of the case, we do not find it necessary to consider them.

*Exceptions sustained.*

*J. Parker*, (of New York) (*F. M. Bizby* with him,) for the defendant.

*Asa P. French*, District Attorney, for the Commonwealth.

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ARTHUR L. RUGGLES vs. ROSA BERNSTEIN & others.

Suffolk. March 20, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Judgment.*

In an action on a bond to dissolve a mechanic's lien where no fraud or collusion appears a judgment establishing the lien is conclusive as to the debt thereby ascertained both against the principal and the surety.

CONTRACT on a bond to dissolve a mechanic's lien. Writ in the Police Court of Chelsea dated July 15, 1903.



On appeal to the Superior Court the case was heard by *Aiken, J.*, without a jury. It appeared that, the plaintiff having filed a petition in the Police Court of Chelsea to enforce a mechanic's lien, the defendant Rosa Bernstein, as principal, and the defendants Bessie Aronberg and Horatio F. Twombly, as sureties, on March 5, 1903, executed the bond to the plaintiff to dissolve the lien. Upon the original petition counsel appeared for the respondent Bernstein, who subsequently was defaulted, and on a hearing, on June 12, 1903, the lien was established in the sum of \$450.50 damages, and \$13.82 costs; at that hearing Bernstein was not present in person nor by counsel. Bernstein not having paid the plaintiff the amount named within thirty days after final judgment thereon, the plaintiff began the present action upon the bond in the police court, and on September 11, 1903, obtained judgment by default in the sum of \$464.32 as damages and \$16.32 costs, from which judgment the defendant Twombly appealed, bringing the case to the Superior Court. In that court the defendants were defaulted, and the judge after default assessed damages in the penal sum of the bond, \$1,000, and heard the parties upon the question of the amount for which execution should be awarded.

The defendant Twombly, under R. L. c. 177, § 10, offered evidence to prove that the original petition brought to enforce the mechanic's lien could not be maintained by reason of the fact that the debt due the petitioner was a contract price under an entire contract, that the contract never had been performed by the petitioner, that no statement ever had been filed properly covering this debt, and that the statement filed was prematurely filed and was not in accordance with the statute, and also offered evidence to prove that, if the petitioner could establish a lien for any amount, the principal defendant, Bernstein, had made substantial payments to the plaintiff on account of the work performed under the contract before the statement was filed, for which no credit was given the principal defendant in the statement, and also offered evidence to prove that at the hearing in the police court, when the lien was established, the principal defendant was not personally present or represented by counsel.

The judge excluded the evidence, and awarded execution to issue for the sum of \$500.13. The defendant Twombly alleged exceptions.



*M. R. Thomas*, for the defendant Twombly.

*S. R. Cutler*, for the plaintiff, was not called upon.

HAMMOND, J. The evidence excluded related to defences which could have been set up in the original action. No fraud or collusion being shown, the judgment rendered against the principal was conclusive evidence of the debt thereby ascertained, both against her and against the surety. *Cutter v. Evans*, 115 Mass. 27. *Way v. Lewis*, 115 Mass. 26, and cases there cited.

*Exceptions overruled.*

# OLD COLONY RAILROAD COMPANY vs. CITY OF NEW BEDFORD.

Suffolk. March 22, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Municipal Corporations. Contract, Validity. Railroad.*

A city may make a valid contract with a railroad company that in consideration of the railroad company withdrawing its opposition to the laying out of a highway at grade under Pub. Sts. c. 112, § 125, across the railroad of the company, the city will pay the expense of erecting gates and maintaining a gateman at the crossing, if the agreement is made in contemplation of the authorization by the county commissioners of the laying out of the highway across the railroad and such authorization subsequently is given by an order of the county commissioners adjudging that the public safety requires the erection of gates at this crossing and a person to open and close them, as the expense may be regarded as "incident to constructing and maintaining the way at such crossing," and thus an expense for which the city is liable under Pub. Sts. c. 112, § 123, until or unless it is otherwise determined by an award of a special commission.

CONTRACT, for \$2,724.33 on an account annexed for money paid by the plaintiff at the request of the defendant for erecting and maintaining gates at the crossing of Sawyer Street, a highway of the defendant, with the railroad of the plaintiff, and for the services of a gateman at that crossing from April 6, 1894, until November 6, 1900, inclusive. Writ dated November 9, 1900.

In the Superior Court the case was heard upon an agreed statement of facts by *Gaskill*, J. who gave judgment for the defendant; and the plaintiff appealed.



*J. H. Benton, Jr. & H. W. Beal*, for the plaintiff.

*A. Hemenway & J. W. Farley*, for the defendant.

KNOWLTON, C. J. In the year 1885 it was thought desirable to lay out a street at grade across the plaintiff's railroad in New Bedford, and the board of aldermen, acting under the Pub. Sts. c. 112, § 125, directed the city solicitor to proceed in their name, by a petition before the county commissioners, to obtain authority so to lay out this street. At the hearing before the county commissioners the railroad company objected to the granting of the petition, because of the liability to accident from such a crossing, and the possible or probable necessity of maintaining gates for the protection of the public. Thereupon an agreement was made between the railroad company, by its counsel, and the city, by its solicitor, that the company should consent to the granting of the petition on condition that the city be required to erect and maintain a gate at the crossing, and station an agent there to open and close it when an engine or train should pass. The county commissioners, reciting this agreement in their order, adjudged that the public convenience and necessity required the laying out of the street across the way at grade, and suspended their proceedings until action should be taken in regard to the matter by the railroad commissioners. The railroad commissioners, upon petition under this section, consented to the laying out and construction of the street as proposed, and the county commissioners then made a final decree reciting their former proceedings, and authorizing the laying out of the way across the railroad at grade, and adjudged that public safety required the erection of gates at the crossing, with an agent to open and close them when an engine or train should pass. They then ordered the maintenance of the gates with a gateman, and, referring to the agreement on file, directed that the expenses of the gates and agent be paid by the city of New Bedford. The street was accordingly laid out and constructed, and the city counsel, by an order, authorized the mayor, in behalf of the city, to contract with the railroad company for the erection of the gates and the providing of an agent to tend them as required by the order of the county commissioners. Such a contract was accordingly made, and the railroad company has ever since maintained the gates and paid the agent for operating them. The



expense of this was paid by the city to the plaintiff for nearly eight years, but lately the city has declined to pay, on the ground that it has not a legal right to expend money for this purpose. This action is brought to recover for the expense of maintaining the gateman.

The original agreement made by counsel before the county commissioners, which lies at the foundation of the claim, may be considered in either of two aspects: first as an attempt to buy off opposition to the petition filed by the mayor and aldermen, and thereby to procure from a quasi judicial tribunal a decision which might not be made if the questions before the tribunal were to be decided solely with reference to the interests of the public and of the private parties directly concerned; and secondly, as an agreement to assume an obligation for the benefit of the public, which the railroad company feared might otherwise rest upon it. Viewed simply and narrowly as an attempt to influence the decision of the county commissioners by paying an objecting party to withdraw his opposition to a petition, we think it plain that it is not within the powers conferred by the statute upon cities and towns. Such a contract, made for no other purpose, in reference to a matter like the laying out of a highway, would be against public policy. *Coppock v. Bower*, 4 M. & W. 361. *Howard v. First Independent Church of Baltimore*, 18 Md. 451. *Pingry v. Washburn*, 1 Aik. (Vt.) 264. *Jacobs v. Tobiasson*, 65 Iowa, 245. *Maguire v. Smock*, 42 Ind. 1. *Smith v. Applegate*, 3 Zab. 352. *Doane v. Chicago City Railway*, 160 Ill. 22. So too, if we view it solely in reference to this possible purpose, it purports to impose a pecuniary obligation upon the city, which the city has no right to assume, and for which it cannot lawfully tax its inhabitants. *Mead v. Acton*, 139 Mass. 341. *Coolidge v. Brookline*, 114 Mass. 592. *Minot v. West Roxbury*, 112 Mass. 1. *Frost v. Belmont*, 6 Allen, 152. *Clafin v. Hopkinton*, 4 Gray, 502.

But the plaintiff's claim does not rest solely nor chiefly upon the executed promise of the railroad company to withdraw its opposition to the petition. It stands upon a broader ground. While in ordinary cases we should be inclined to hold that a city or town could not bind itself by a contract with a railroad company to pay the expense of erecting gates and maintaining



a gateman at a crossing, because such a contract would be outside of the statutory provisions authorizing the expenditure of money for the construction and maintenance of ways, we have, for a case of this kind, a statute that creates a liability on the part of the city, which well might be made the subject of a contract, at least for a reasonable time. The last part of Pub. Sta. c. 112, § 128, is as follows: "If, after the laying out and making of a railroad, the county commissioners authorize a highway or other way to be laid out across the railroad, all expenses of and incident to constructing and maintaining the way at such crossing shall be borne by the county, city, town, or other owner of the same, until or unless in either case it is otherwise determined by an award of a special commission, as provided in the five following sections." The county commissioners having adjudged that the public safety required the erection of gates at this crossing, with a person to open and close them, the expense of this was "incident to constructing and maintaining the way at such crossing," within the meaning of the statute. It is to be assumed that the liability created by this statute was one of the grounds of the original agreement, and was the principal ground of the final contract on which this suit is brought.

We are of opinion that there should be a

*Judgment for the plaintiff.*

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MARGARET M. PHELAN vs. GEORGE C. FITZPATRICK.

Suffolk. March 23, 24, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Landlord and Tenant. Evidence.*

A girl living with her father and mother in a tenement on the third floor of a building, who is injured by a fall caused by the breaking of the railing of a platform of the tenement while she is taking in clothes from a line attached to the railing, is in no better position as regards the liability of the landlord than either of her parents would have been if injured in like manner.

The principle, that in the absence of an agreement on the subject a landlord is under no obligation to his tenant to put the premises in better condition than they were at the time of the letting, applies to a defective railing of a platform attached to a tenement on the third floor of a building and used by the tenant



for storing fuel, hanging out clothes and other purposes, although staircases to and from the platform are used generally by the tenants in the building in passing between their several tenements and the yard below.

If a landlord on one occasion at the request of a tenant voluntarily undertakes with a hammer and nails furnished him by the tenant to repair the railing of a platform extending from the tenement, this is not an admission of liability on the part of the landlord in case the tenant or her daughter afterwards is injured from the railing giving way.

MORTON, J. This is an action of tort to recover for injuries sustained by the plaintiff in consequence of a fall from a platform in the third story of a building belonging to the defendant. The fall was caused by the breaking of the railing while the plaintiff was taking in clothes from a line attached to the railing. The plaintiff lived with her parents who occupied a tenement on the third floor of the building. The judge ordered a verdict for the defendant and the case is here on the plaintiff's exceptions to that ruling.

The plaintiff stands in no better position than her parents would have stood in if either one of them had been injured under like circumstances. She was in under their rights as tenants. *Wilcox v. Zane*, 167 Mass. 302. And it is plain it seems to us that that portion of the platform enclosed by the railing constituted a part of the tenement which was hired by them from the defendant. It is true that stairs connecting the various tenements with the yard went from one platform to the other. But the common use of the platforms was confined to so much of them as was occupied by the stairs and was reasonably incident thereto. The rest of the platforms was used by those occupying the tenements with which they were severally connected. The platform connected with the tenement occupied by the plaintiff and her parents was used by them to store wood and coal on and for other private purposes. The water closet belonging to the tenement was situated there, and the clothes line, whoever put it there, as to which there was some dispute, was not a line for common use but for the use of the occupants of the tenement. In hiring the tenement the rule of *caveat emptor* applied, therefore, to the platform and the railing as well as to the rest of the tenement. The plaintiff's parents took the tenement in the condition in which it was, and the defendant was under no obligation to repair the railing if it needed repair or to make subsequent repairs.



*Booth v. Merriam*, 155 Mass. 521. *Bowe v. Hunking*, 135 Mass. 380. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472. *Szathmary v. Adams*, 166 Mass. 145. *Galvin v. Beals*, 187 Mass. 250. The fact that the defendant voluntarily undertook on one occasion at the request of the plaintiff's mother to repair the railing with a hammer and nails which she furnished him would not constitute an admission of liability on his part or render him liable if the railing afterwards gave way. It was a gratuitous act on his part which imposed no liability upon him. *McLean v. Fiske Wharf & Warehouse Co.*, *ubi supra*. *McKeon v. Cutter*, 156 Mass. 296. *Kearnes v. Cullen*, 183 Mass. 298.

*Exceptions overruled.*

*J. J. Feely*, (*R. Clapp* with him,) for the plaintiff.

*S. R. Jones*, for the defendant.

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**ATTORNEY GENERAL**, at the relation of the Commissioner of Corporations, *vs.* **ELECTRIC STORAGE BATTERY COMPANY.**

**ATTORNEY GENERAL**, at the relation of the Treasurer of the Commonwealth, *vs.* **SAME.**

Suffolk. March 27, 1905. — May 19, 1905.

Present: **KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.**

*Constitutional Law. Corporation. Statute, Construction.*

St. 1903, c. 487, §§ 58, 66, 67, 75, imposing an excise tax on every foreign corporation organized for certain purposes "which has a usual place of business in this Commonwealth," although it does not apply to a corporation whose place of business is established and maintained solely for use in interstate commerce, applies to a corporation engaged in interstate commerce which at the same time has a place of business for other purposes, and so applied is constitutional.

**KNOWLTON, C. J.** These are informations in equity brought by the attorney general against a foreign corporation, the first at the relation of the commissioner of corporations, under St. 1903, c. 487, § 50, and the second at the relation of the treasurer and receiver general, under § 78 of the same chapter, to enforce the provisions of §§ 66, 67 and 75. These require every foreign cor-



poration, of the classes described in § 58, annually to file in the office of the secretary of the Commonwealth a certificate of certain facts, and to pay an excise tax assessed upon its capital stock by the tax commissioner. The classes of foreign corporations described in § 58 include every one "which has a usual place of business in this Commonwealth, or which is engaged in this Commonwealth, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind." The defendant has a usual place of business in this Commonwealth, and the tax to be assessed under § 75 is for the commodity or privilege of having such a place of business here. Const. Mass. c. 1, § 1, art. 4. *Attorney General v. Bay State Mining Co.* 99 Mass. 148. *Minot v. Winthrop*, 162 Mass. 113. *Provident Institution v. Massachusetts*, 6 Wall. 611. *Hamilton Co. v. Massachusetts*, 6 Wall. 632.

The general right of a State to prescribe the terms and conditions on which a foreign corporation may do business therein is unquestioned. *Attorney General v. Bay State Mining Co.*, *ubi supra*. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28. *Hooper v. California*, 155 U. S. 648. A corporation is not a citizen of a State, within the meaning of art. 4, § 2, of the Constitution of the United States, which secures to the citizens of each State the privileges and immunities of the citizens of the several States. *Paul v. Virginia*, 8 Wall. 168. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181. An important limitation of this right of a State to impose conditions forbids the restriction or regulation of interstate commerce in which such a corporation is engaged. *Commonwealth v. Petranich*, 183 Mass. 217, 219. *Pickard v. Pullman Southern Car Co.* 117 U. S. 34. *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727. *Leloup v. Port of Mobile*, 127 U. S. 640. *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114. *Crutcher v. Kentucky*, 141 U. S. 47. *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692.

If the statute before us applied to the maintenance of a place of business solely for the purpose of engaging in interstate commerce it would be unconstitutional. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114. Its language is broad enough to



include every corporation which has a usual place of business in the Commonwealth, even though it is a common carrier engaged in interstate commerce, and has its place of business here as a necessary means of carrying on this commerce. But it is a rule of law that a statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the Legislature. As was said by Mr. Justice Devens in *Commonwealth v. Gagne*, 153 Mass. 205, 206, 207: "Indeed, where two governments, like those of the United States and the Commonwealth, exercise their authority within the same territory and over the same citizens, the legislation of that which as to certain subjects is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded." *White v. Gove*, 183 Mass. 383, 388. *Attorney General v. Netherlands Ins. Co.* 181 Mass. 522. *Supervisors v. Stanley*, 105 U. S. 305, and cases cited. *Kehrer v. Stewart*, 25 Sup. Ct. Rep. 403; *S. C.* 117 Ga. 969. *Osborne v. Florida*, 164 U. S. 650. *People v. Butler Street Foundry & Iron Co.* 201 Ill. 236. In accordance with the doctrine referred to in the cases above cited, we are of opinion that the Legislature cannot have intended to include in this statute corporations whose usual place of business is established and maintained solely for use in interstate commerce. With this construction of the law, it is plainly constitutional.

It remains to consider whether the defendant has a place of business in Massachusetts which is used for purposes other than interstate commerce. The agreed facts show that it has. It maintains an office which apparently is not necessary to its interstate business, and if it is necessary to this part of its business, it is used in part in a domestic business. It also maintains an "exide station" for the purpose of repairing, and supplying to customers parts for repairing, the apparatus previously sold by it. While the statute is inapplicable to any business or place which belongs entirely to interstate commerce, it is applicable to the defendant, a corporation engaged in interstate commerce, which has, at the same time, a place of business for other purposes.



The principle has been recognized repeatedly by the Supreme Court of the United States in similar cases. *Osborne v. Florida*, 164 U. S. 650. *Pullman Co. v. Adams*, 189 U. S. 420. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181. *Allen v. Pullman's Palace Car Co.* 191 U. S. 171. *Ficklen v. Shelby County Taxing District*, 145 U. S. 1. *Brennan v. Titusville*, 153 U. S. 289. *Ashley v. Ryan*, 153 U. S. 436. *Reymann Brewing Co. v. Brister*, 179 U. S. 445. *Pennsylvania Railroad v. Knight*, 192 U. S. 21.

We are therefore of opinion that the defendant is liable to the forfeiture claimed in the first suit, and that the plaintiff is entitled to an injunction restraining the further prosecution of the defendant's business in this Commonwealth, except the business of disposing of its goods as a part of interstate commerce, until this forfeiture, with interest and costs, is paid, and the certificate required by the statute is filed. In the second suit the plaintiff is entitled to a like injunction, to remain in force until the taxes, with interests and costs, are paid.

*So ordered.*

*F. H. Nash*, Assistant Attorney General, for the relators.

*G. R. Nutter*, (*J. B. Studley* with him,) for the defendant.

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WILLIAM H. SELTZER vs. AMESBURY AND SALISBURY  
GAS COMPANY.

HARVEY R. NUTTING vs. SAME.

Essex. March 28, 1905. — May 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Nuisance. Way. Gas Light Company.*

The provision of R. L. c. 51, § 20, requiring notice of the time, place and cause of an injury from a defect in a highway is applicable only to an action brought for a failure to perform a duty imposed by statute of keeping the way in repair, and has no application to an action at common law against a person digging a pit in a highway and leaving it insufficiently or improperly filled.

The obligation of a gas light company under R. L. c. 110, § 76, to put streets which it has dug up "into as good repair as they were in when opened" does not oblige such a company to keep such highways in repair within the meaning of R. L.



c. 51, § 20, and the requirement of that section as to notice of the time, place and cause of an injury from a defect in a highway does not apply to an action against a gas light company.

TWO ACTIONS OF TORT by different plaintiffs against the Amesbury and Salisbury Gas Company for injuries incurred while travelling on Beach Road, a public highway in the town of Salisbury, from the alleged improper filling of a trench dug by the defendant for the purpose of laying gas pipes in that highway, by reason of which the wheel of the wagon in which the plaintiffs were driving sank into the trench, throwing the plaintiffs to the ground. Writs dated February 26, 1903.

In the Superior Court the cases were tried together before *DeCourcy, J.* A third case by Nutting against the town of Salisbury, in which the jury returned a verdict for the defendant, was tried at the same time. At the conclusion of the evidence the defendant requested the judge to rule, that "The defendant gas company was entitled to notice of the time, place and cause of the accident, and inasmuch as it does not appear that the plaintiffs or either of them gave such notice to the said company they are not entitled to recover against said company under the first counts of their respective declarations." The judge declined to rule as requested, but ruled that the plaintiffs were not bound to give notice to the defendant gas company of the time, place and cause of the accident in order to entitle them to maintain their actions against it under the first counts of their respective declarations, and submitted the cases to the jury.

In each of the cases against the gas company the jury returned a verdict for the plaintiff, for Seltzer in the sum of \$450, and for Nutting in the sum of \$500. The defendant alleged exceptions in both cases.

*H. F. Hurlburt & D. E. Hall*, for the defendant.

*R. E. Burke & D. P. Page*, for the plaintiffs.

HAMMOND, J. The sole question is whether the provisions found in R. L. c. 51, § 20, requiring notice of the time, place and cause of the injury to be given are applicable to this action.

By the plain reading of the statute, the provision for such a notice is applicable only where the action is brought for failure to perform the duty imposed by law of keeping the way in repair.



And it is applicable in such an action whether the defendant be a town, corporation or person. *Dickie v. Boston & Albany Railroad*, 131 Mass. 516. *Dobbins v. West End Street Railway*, 168 Mass. 556. Where, however, the action is at common law for creating a defect in the highway, it is not applicable. *Hand v. Brookline*, 126 Mass. 324. *Fisher v. Cushing*, 184 Mass. 374.

We are of opinion that the defendant was not a party obliged by law to keep in repair the highway within the meaning of R. L. c. 51, § 20. R. L. c. 110, § 76, provides that "gas light companies . . . may, with the consent in writing of the mayor and aldermen of a city or the selectmen of a town, dig up and open the ground in any of the streets, lanes and highways thereof, so far as is necessary to accomplish the objects of the corporation ; but such consent shall not affect the right or remedy to recover damages for an injury caused to persons or property by the acts of such corporations. They shall put all such streets, lanes and highways into as good repair as they were in when opened ; and upon failure so to do within a reasonable time, shall be guilty of a nuisance."

It is plain that this act does not impose upon gas companies the duty of keeping in repair that portion of the street which they may temporarily dig up. It simply requires them to put the streets "into as good repair as they were in when opened." When that is done, their duty is performed, and that is so although even then the street is left defective. They may leave the street as they found it. If they found it defective, they may leave it with the same defect. Such an obligation comes far short of a liability to keep the street in repair. Moreover, the statute has reference simply to a temporary condition of things, existing while the work is going on, and extending only so long as may be reasonably necessary to put the road in its former condition. In the present action the liability of the defendant is not based upon its failure to keep the road in proper repair, but upon its act in digging a pit and leaving it insufficiently or improperly filled, thus creating an obstruction to public travel. See *Hand v. Brookline*, *ubi supra*.

*Exceptions overruled.*



## FANNIE JACOBS vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. November 15, 1904. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.*Witness, Impeachment of.*

In an action of tort against a railway company for personal injuries, a witness who had testified for the plaintiff was asked on cross-examination whether the signature to a paper, containing questions and answers relating to the accident and signed with his name and address, was his. He said that it was not and in answer to a further question testified that the answers to the questions on the paper were not in his handwriting. He then at the request of the defendant's counsel wrote in open court his name and address in the words in which they appeared on the paper. The defendant then offered the paper in evidence for the purpose of allowing the jury to compare the handwriting on the paper with that of the witness done in their presence, in order that if they found that the signature and the answers to the questions were written by him they might consider the inconsistency of the answers with his testimony as bearing on his credibility. The judge refused to admit any portion of the paper except the signature and address, and, upon the defendant refusing to separate the signature and address from the questions and answers, excluded the whole paper, and ruled that it could not be submitted to the jury for the purpose of impeaching the witness. *Held*, that the exclusion and the ruling were not sufficient ground for sustaining an exception.

LATHROP, J. This is an action of tort for personal injuries alleged to have been sustained by the plaintiff by the sudden starting of a car of the defendant while she was alighting from it. The jury returned a verdict for the plaintiff, and the case is before us on a single exception to the exclusion of evidence offered by the defendant.

One Patrick J. McNalley was a witness for the plaintiff and gave material evidence in her favor. He testified that at the time of the accident he was living at No. 17 Whittier Street, Roxbury. On cross-examination he was shown a paper signed "Patrick J. McNalley, 17 Whittier St., Roxbury." This paper, which is called in the bill of exceptions Exhibit A, contained several questions and answers relating to the accident. Some of the answers were contradictory to the testimony of the witness in regard to the accident. The witness was then asked if the signature on the paper was his, and he said it was not. He was



then asked to read the paper, which he did. The question was then put to him, whether the statements in the answers in the paper concerning the accident were in his handwriting, and he said they were not. The witness was then requested to write the words: "Patrick J. McNalley, 17 Whittier St., Roxbury," upon a blank piece of paper, in the presence of the judge and jury. He did so, without objection.

The defendant offered in evidence the paper on which the witness had written the words above named in the presence of the judge and jury, and this paper was admitted in evidence by the judge without objection. The defendant also offered in evidence the paper, Exhibit A, for the purpose of allowing the jury to compare the handwriting in this paper with the writing of this witness made in their presence, and in order that, if the jury found by the comparison of handwritings that the signatures were in the same handwriting, and that the answers to the questions concerning the accident contained in Exhibit A were in the handwriting of the witness, the jury might consider those answers so far as they were inconsistent with his testimony, as bearing upon the credibility of the witness.

The plaintiff's counsel objected to the admission of Exhibit A, excepting the signature and address of the writer, upon the ground that the witness had not been requested to write the rest of the paper for comparison, but the signature and address only. The judge stated that the signature and address on the paper might be admitted, but that the rest of the paper could not go to the jury, and upon the statement of the defendant's counsel that he would not cut off the signature and address from the rest of the paper, the judge excluded the paper, Exhibit A, and ruled that it could not be submitted to the jury for the purposes named. The defendant duly excepted to the exclusion of the paper and to the ruling of the judge.

There can be no doubt that if Exhibit A had been admitted in evidence and the jury had been satisfied that it had been signed by the witness McNalley, his testimony would have been contradicted on material points. The only objection made at the trial to the admission of the exhibit was that the witness had not been requested to write the rest of the paper for comparison, but the signature and address only. Some of us think



that the presiding judge adopted this view, as he was willing to admit the signature and address but ruled that the rest of the paper could not go to the jury. It would have been of no use to admit the signature and address without the rest of the paper, for this would have proved nothing.

The majority of the court is, however, of opinion that the ruling of the presiding judge was confined to the precise offer of proof made. It is not to be understood that if a man signs a paper which contains printed questions, and answers written by a third person with the man's knowledge and consent, such paper is not admissible in evidence. The decision is to be confined to the facts of the case and the offer of proof made. Nor is it to be understood that the judge in any way intended to depart from the general rule heretofore laid down in regard to proof of handwriting. See *Homer v. Wallis*, 11 Mass. 309; *Moody v. Rowell*, 17 Pick. 490, 495; *Richardson v. Newcomb*, 21 Pick. 315; *Commonwealth v. Coe*, 115 Mass. 481, 504, 505.

In the opinion of a majority of the court the order must be

*Exceptions overruled.*

The case was submitted on briefs at the sitting of the court in November, 1904, and afterwards was submitted on briefs to all the justices.

*G. L. Mayberry*, for the defendant.

*T. W. Coakley, D. H. Coakley & C. C. Johnson*, for the plaintiff.

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NORMAN F. HESSELTINE, trustee, vs. LILLIE G. HODGES  
& another.

Suffolk. November 29, 1904. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Bankruptcy, Rights of trustee. Fraud, As against creditors.*

In a suit in equity by a trustee in bankruptcy to set aside a conveyance by the bankrupt to a third person to the use of his wife and by the wife to her sister, as in fraud of creditors, it was held that on the facts found by a master to whom the case had been referred the title of the defendants under a foreclosure of a mortgage was independent of that of the bankrupt and good against the plaintiff.



**BILL IN EQUITY**, filed April 27, 1908, by the trustee in bankruptcy of the estate of William L. Hodges to set aside certain conveyances of real estate in Stoughton made by the bankrupt to his wife Lillie G. Hodges and by her to her sister Ella A. Simmonds, including conveyances of the homestead estate mentioned in the opinion, which was called in the bill the first parcel.

In the Superior Court the case was referred to a master. In a supplemental report the master found the following facts in regard to the first parcel or homestead:

That William L. Hodges on June 20, 1899, mortgaged for \$5,000 the land described in the plaintiff's bill as the first parcel to the Randolph Savings Bank, and on February 8, 1900, he conveyed all the land in Stoughton of which he was seised to Edgar F. Leonard to the use and behoof of Lillie Gray Hodges and her heirs; that on April 29, 1901, Lillie G. Hodges quitclaimed all interest in the premises conveyed to her use on February 8, 1900, to the respondent Ella A. Simmonds; that on May 4, 1901, the Randolph Savings Bank entered and foreclosed its mortgage and sold the premises therein described to Lillie G. Hodges, wife of William L. Hodges; that on May 8, 1901, Lillie G. Hodges and Ella A. Simmonds mortgaged the lots named in the plaintiff's bill as the first, second and third parcels to the North Easton Savings Bank; that the foreclosure of the Randolph Savings Bank mentioned above was suffered by Mr. Hodges without the consent or knowledge of Mrs. Hodges or Miss Simmonds, who knew nothing about it at the time; that on February 20, 1902, Lillie G. Hodges reconveyed the land described in the plaintiff's bill as the first parcel to Ella A. Simmonds; that shortly after the foreclosure Mrs. Hodges executed a mortgage to the North Easton Savings Bank for \$5,500, that being substantially the amount of indebtedness to the Randolph Savings Bank, in which conveyance Miss Simmonds joined to convey the second and third parcels not included in the mortgage to the Randolph Savings Bank, and that neither Mrs. Hodges nor Miss Simmonds gave any consideration for these conveyances, but no question was raised as to the validity of the mortgages; that Miss Simmonds lived with William L. Hodges and Mrs. Hodges during the time of these proceedings



as one of the family and had advanced money to Mr. Hodges and his wife at various times during the years she had lived with them; that Mrs. Hodges had received a considerable amount of money from Miss Simmonds at various times previous to the dates of the deeds given to Miss Simmonds and subsequent thereto, and the advances amounted to \$3,875 on January 29, 1902, but no payment was made at the time and no adjustment was made between the parties; that before the deeds by Hodges to Leonard for his wife, Mrs. Hodges had from her separate estate advanced sums of money to her husband, and had indorsed notes for her husband that were scheduled to upwards of \$2,000 and also had given him money to invest for her in considerable amounts, some of which was invested in mortgages in her name which were discharged without payment to her, but no advance was made at the time of the conveyance to her, nor was any adjustment made between the husband and wife; and that the value of the equity in the real estate would not have been an inadequate consideration for the amounts advanced.

After the argument of exceptions to this supplemental report as well as to the original report of the master, the Superior Court made an interlocutory decree overruling the exceptions and ordering that the master's report be confirmed, and later made a final decree declaring that the conveyances of the parcel of real estate described in the plaintiff's bill as the first parcel was in fraud of creditors and without consideration, and ordering the defendants to convey that and other real estate to the plaintiff subject to any statutory rights therein of the defendant Lillie G. Hodges. The defendants appealed from both decrees.

*T. E. Grover*, for the defendants.

*N. F. Hesseltine*, (*A. W. Shepard* with him,) for the plaintiff.

HAMMOND, J. 1. As to the homestead estate. The defendants objected to the master's report upon the ground that their title to the homestead property was an independent title by foreclosure of a valid mortgage. This exception is sound and must be sustained. The validity of the mortgage given to the Randolph Savings Bank is not questioned. The bank rightfully foreclosed, and under the power contained in the mortgage sold and conveyed the estate to Mrs. Hodges. The master does not



find any fraud in this transaction. He finds that Mrs. Hodges gave no consideration for this land, but he finds that "shortly after the foreclosure [she] executed a mortgage for fifty-five hundred dollars to the North Easton Savings Bank being substantially the amount of indebtedness to the Randolph Savings Bank in which conveyance" the defendant Simmonds "joined to convey the second and third parcels not included in" the last named mortgage. The fair construction of the report is that Mrs. Hodges paid to the Randolph Savings Bank the money obtained from the North Easton Savings Bank. It is not found by the master that she acted fraudulently in this matter, and she certainly had the right to buy at the foreclosure sale if she saw fit. Having a good title to the property she lawfully could convey it to the defendant Simmonds, as she did by deed of February 20, 1902, and the grantee held it by a good title. In so far as the final decree declares that the deed of the Randolph Savings Bank to Mrs. Hodges and her deed to Simmonds of February 20, 1902, were in fraud of the creditors of William L. Hodges, and orders that the defendants convey to the plaintiff the interests acquired thereunder, it is not supported by the facts found by the master and is erroneous.

2. As to the other exceptions to the master's report, it is sufficient to say that so far as they are legitimately before us and are material they seem to be untenable.

Except as to the homestead estate the decree is affirmed. As to that estate it must be reversed.

*Ordered accordingly.*

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### SELECTMEN OF WELLESLEY vs. BOSTON AND WORCESTER STREET RAILWAY COMPANY.

Worcester. December 8, 9, 1904. — May 20, 1905.

Present : KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

#### *Street Railway.*

Under R. L. c. 112, § 7, the board of aldermen of a city or the selectmen of a town in granting a location to a street railway company cannot impose a condition



regulating fares. Following *Keefe v. Lexington & Boston Street Railway*, 185 Mass. 183.

Under R. L. c. 112, § 7, the board of aldermen of a city or the selectmen of a town in granting a location to a street railway company lawfully may impose a condition that the company shall furnish a system of electric lighting from its own power station for the entire length of the location, giving light of a specified power.

There is nothing in R. L. c. 121, §§ 24, 26, c. 122, § 1, or any other statute of the Commonwealth making it unlawful for a street railway company as an incident to its business to use electricity from its power station in lighting the streets through which its cars run.

BILL IN EQUITY, filed in the Supreme Judicial Court on July 14, 1903, under R. L. c. 112, § 100, by the selectmen of the town of Wellesley to enforce certain conditions imposed on the Boston and Worcester Street Railway Company by a location granted on January 17, 1902, and accepted by that company on February 14, 1902.

The case came on to be heard before *Barker, J.*, who, at the request of the parties, reserved it for determination by the full court, upon the pleadings, the report of a special master, with the exceptions thereto, the interlocutory decree thereon and the appeal therefrom, and the amended report of the special master, with the exceptions thereto, and the interlocutory decree thereon and the appeals therefrom, such disposition to be made of the case as justice might require.

The two conditions of the location referred to in the opinion were as follows :

“Fifth : The poles or structures for conveying electricity for the operation of said railway shall be placed between the tracks in the middle of the reserved space, shall be painted, properly protected from decay, and of material satisfactory to said selectmen ; and like provisions shall be made for such other poles as shall be required wherever said tracks shall not be located within a reserved space. Said poles or structures shall be placed as the selectmen shall direct and approve. Said street railway company shall furnish a system of electric lighting from its own power station for the entire length of said street, and attach and maintain upon each pole on which such attachment is required, two bracket arms upon a longitudinal axis of the street, and furnish and maintain the same with incandescent lamps and current of eighty-seven and one-half watts energy, such as will maintain



and furnish light for not to exceed one hundred lamps in number, giving light of the standard of twenty-five candle power, throughout every night in the year, between the hours of sunset and sunrise; the number and location of said lamps to be determined by the selectmen, and any change in the hours of lighting to be subject to their order from time to time."

"Fifteenth: Said street railway company shall charge not exceeding five cents for a single fare over its railway between any part of Wellesley and the point of junction with the Boston Elevated Railway Company's tracks in Brookline, nor between any two points in the town of Wellesley, nor between any part of Wellesley and North Main street, Natick, at the junction of the Natick and Cochituate Street Railway tracks. The payment of said fare of five cents shall entitle the passenger paying the same to a transfer providing for a continuous ride in said town upon the cars of any street railway within the limits of the town of Wellesley whose tracks cross or connect, or shall hereafter cross or connect with the railway of said street railway company, the rates of fare charged by said street railway company for the transportation of scholars of the public schools of said town between any given points from or to which it is necessary for them to ride in travelling to and from the schoolhouse in which they attend school and their home, shall not exceed one half the regular fare charged by said street railway company for the transportation of other passengers between said points. Tickets for the transportation of scholars as aforesaid shall be sold in lots of ten each, and shall be received on said street railway only on such days as said schools shall be in session."

*V. J. Loring, (C. S. Quinn with him,) for the plaintiffs.*

*G. W. Cox, for the defendant.*

LORING, J. With two exceptions all the questions raised in this case have been disposed of by a stipulation entered into between the parties since the argument. The two questions not so disposed of relate to the validity of two restrictions contained in the location of the defendant corporation's railway in the town of Wellesley, over Worcester Street, otherwise known as the Boston and Worcester Turnpike, in said town, to wit, (1) so much of the fifth as requires the defendant to light said street to the extent there prescribed, and (2) the fifteenth, which



regulates fares in Wellesley and between the junction of the defendant's tracks with those of the Boston Elevated Railway in Brookline to any point in Wellesley, and from any point in Wellesley to the junction of the defendant's tracks with those of the Natick and Cochituate Street Railway tracks in Natick.

On the question of fares the case of *Keefe v. Lexington & Boston Street Railway*, 185 Mass. 183, is decisive. The location there in question was governed by the same provisions of law as those which govern the location now before us. The only difference is that the acts in force when the location in *Keefe v. Lexington & Boston Street Railway* was granted had been reenacted in the Revised Laws at the date of the location here in question. We find nothing in the argument attacking the decision made in that case which requires discussion.

This brings us to the question of lights. Apart from the fact that by the last clause of St. 1898, c. 578, § 13, restrictions in locations made before that act are put on the same footing as restrictions under the act, *Selectmen of Hyde Park v. Old Colony Street Railway*, ante, 180, the restriction as to lights in the case at bar is of the same character as that as to watering in *Newcomb v. Norfolk Western Street Railway*, 179 Mass. 449, and that as to repairs in *Selectmen of Hyde Park v. Old Colony Street Railway*, ante, 180. Electric cars in a reserved space ordinarily are run at such a rate of speed that it well might be thought that a grant of the right to run them makes it necessary to have one hundred lights of twenty-five candle power each, in the distance of five miles. It is not necessary to consider whether the fact that such lights might be thought necessary for the accommodation of people wishing to take the defendant's cars could be considered by the selectmen in making this requirement.

The defendant has argued that it is forbidden to use its electricity for lighting purposes by R. L. cc. 121, 122, calling especial attention to §§ 24 and 26 of c. 121, and § 1 of c. 122. But we are of opinion that it is not forbidden to use electricity for lighting as an incident to its business. It may use it to light its cars. And in our opinion it may use it as properly to light the streets through which its cars run as to light its cars while running through those streets.

*Decree accordingly.*



**BUSELL TRIMMER COMPANY vs. CHARLES F. COBURN.**

Suffolk. January 8, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Corporation. Contract. Damages. Judgment.*

Where a person is both president and manager of a corporation and receives a salary, in the absence of evidence as to the services for which the salary is paid it may be inferred that it is paid for his services as manager.

Electing a person as an officer of a corporation under ordinary circumstances is not a contract with him for a stated time, and implies no agreement on the part of the corporation to carry on its business through a year.

If a corporation in electing a person as its president and manager at a certain salary makes a contract with him to carry on its business through a year, and subsequently breaks this contract by a sale of all its property within the year, this does not give the officer a right of action against the corporation for his full salary after his services no longer are required, but only the right to recover the difference between the amount of the salary and what he could have earned in some other occupation, and in the absence of evidence such loss will not be inferred.

If the purchaser of a business agrees to indemnify the vendor against all loss or damage upon any contracts relating to the business upon which the vendor is liable, a judgment obtained against the vendor, in an action brought by the manager of the business for salary for a period after the sale, is not binding on the purchaser if the vendor gave him no notice to come in to defend the action.

CONTRACT for \$1,600.51 on a contract in writing, the material portion of which is quoted in the opinion. Writ in the Municipal Court of the City of Boston dated June 28, 1901.

On appeal to the Superior Court the case was tried before *Pierce, J.*, who ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs at the sitting of the court in January, 1905, and afterwards was submitted on briefs to all the justices.

*R. D. Ware*, for the plaintiff.

*W. C. Cogswell*, for the defendant.

LATHROP, J. The contract in question is dated August 4, 1900. In it the plaintiff is called the vendor, and the defendant the purchaser. By the terms of the contract the vendor assigned



to the purchaser "all of the machinery, stock in trade, fixtures and effects pertaining to its business, and also all the book and other debts now due and owing to the said vendor, and also all contracts, benefits and advantages which have been entered into by the said vendor, or to which it is or can be entitled." The purchaser covenanted with the vendor "that he will at all times hereafter save harmless, and keep indemnified the said vendor from and against all losses, costs, expenses, and damages which may be incurred by reason of any action which shall or may be brought or instituted against the said purchaser, . . . for, or in respect of, the said machinery, stock in trade, effects and premises, or for or in respect of the recovery of the several sums of money which by its books appear to be due and owing from the said vendor in respect of the said trade or business, and also from and against the contracts and engagements to which the said vendor appears to be now liable; and also all interest, costs, expenses, losses, claims and demands on account of the same debts, contracts and engagements respectively or otherwise in relation to the premises."

It appeared in evidence that at the time of the signing of the contract Knight was president of the company and had been connected with it about fifteen years as manager and president. On June 4, 1900, the directors of the plaintiff company elected its officers for the ensuing year, and among them Knight, as president and manager. There was evidence also that Knight sold the manufactures of the company, handled the money, paid the men, looked after the factory and attended to the entire business; and further that at the time of the transfer Knight was receiving a salary of \$2,000 a year.

The plaintiff offered to show that upon November 20, 1900, Knight brought an action against the plaintiff for salary alleged to have accrued to him after the transfer, for the months of August, September, October and part of November, at the rate of \$116.67 per month. The company did not defend the action, and Knight recovered judgment, which judgment was paid by the company. The plaintiff further offered to show that in March, 1901, a further sum was paid by the company to Knight in satisfaction of a claim he made against the company for the balance of the year for which he contended that his contract



continued. The judge excluded this evidence of payments, and the plaintiff excepted.

We are of opinion that the ruling was right. The contract before us transferred to the defendant the machinery, stock in trade, fixtures and book debts. It does not appear that Knight rendered any service to the defendant or that he was expected to do so. Nothing was due to him from the plaintiff when the transfer was made. The contention of the plaintiff is that the liability of the defendant arises under the last clause of the contract, "and also all interest, costs, expenses, losses, claims and demands on account of the same debts, contracts and engagements." The president of a corporation, as an officer, is not *ipso facto* entitled to a salary or to a compensation, and so far as any inference is to be drawn in regard to it, the inference is that the salary was paid to him as manager and not as president. The plaintiff disposed of all its property at the date of the contract, and after that, so far as appears, had nothing to manage. There is nothing to show that the plaintiff was not at liberty to sell its property and wind up its business at any time. Electing a man to an office is not ordinarily to make a contract with him for a stated time. There is nothing to show that the corporation agreed with Knight to continue to carry on business through a year, or to retain him under a salary as manager after it ceased to have anything to manage. The evidence did not go far enough.

There is also another ground which is conclusive against the plaintiff. Even if the plaintiff made a contract with Knight, which it broke by the sale of its property, so that it would be liable to him for such breach, the measure of damages would not be the salary promised, but would be the difference between the salary and what he could have earned in some other occupation. See 1 Sedg. Dam. (8th ed.) §§ 206-208; Mayne, Dam. (7th ed.) 244, 245. The plaintiff put in no evidence on this point, and there is nothing to show that Knight did not earn more in some other occupation.

The judgment in the action brought by Knight against the plaintiff was not binding on the defendant, in the absence of a notice to come in and defend. No such notice having been given, it stood merely as a payment; and to make it material the plain-



tiff had to prove that it was rightly made. Until the plaintiff proved that Knight tried to get other employment and entirely failed, there was no proof that either payment made to Knight of his full salary was rightfully made, and payment of such salary without such proof was immaterial as against the defendant, and was rightly excluded.

*Exceptions overruled.*

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MARY E. PARKER vs. FARMERS' FIRE INSURANCE  
COMPANY.

Berkshire. January 11, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Insurance, Fire, Sworn statement of loss. Waiver. Agency. Evidence, Admissions and confessions.*

In an action on a policy of fire insurance in the Massachusetts standard form, where the defence was the failure of the plaintiff to furnish seasonably the sworn statement of loss required by the policy, the plaintiff to show a waiver of this condition put in evidence a letter mailed by her to the defendant containing the following statements: "A man who said he represented your company and the fire marshal from Springfield, Mass., came here three days after the fire and saw my husband and myself, but did not look at the things we saved or go to the farm where the fire occurred. We have left the few things which we were able to save here at Mr. Smith Jones for your agent to view them, but they have not done so. I am here on expense and would like to move the goods away. Can I do so. Please let me know at once." It appeared that the plaintiff received no answer from the defendant denying the authority of the man referred to in her letter as saying that he represented the defendant. *Held*, that the letter of the plaintiff contained no statement that the man referred to came as an adjuster of the loss and therefore the silence of the defendant was not an admission that he was such an adjuster.

CONTRACT upon a policy of fire insurance in the Massachusetts standard form dated May 28, 1897, insuring certain buildings and their contents in the town of Sandisfield to the amount of \$750. Writ dated April 8, 1899.

In the Superior Court the case was tried before *De Courcy*, J. together with another action brought by the same plaintiff against another insurance company on a policy covering the same property. At a previous trial of the two cases the jury



returned a verdict for the plaintiff in each case, and the defendant alleged exceptions which were sustained by this court in a decision reported in 179 Mass. 528, on the ground that there was no evidence that would warrant the jury in finding that the plaintiff had complied with the condition of the policy by using due diligence in sending a sworn statement of her loss to the defendant as soon as she reasonably could. At the new trial *De Courcy, J.* at the close of the plaintiff's evidence ordered the jury to return a verdict for the defendant, and by agreement of parties reported the case against the Farmers' Fire Insurance Company for determination by this court. If upon all the evidence shown or offered to be shown, so far as the same was competent and material, the jury would have been justified in rendering a verdict for the plaintiff, judgment was to be entered for the plaintiff for \$750 and interest from the date of the writ; otherwise, judgment was to be entered for the defendant.

The plaintiff, besides contending that there was evidence of due care on the part of the plaintiff in sending the sworn statement of loss to the defendant, also contended that there was evidence that the defendant had waived this requirement, and that one Davis mentioned in the opinion was the representative of the defendant sent to adjust the loss through whom the waiver was made. At the trial the plaintiff made the following offer of proof upon this subject: The plaintiff offered to show by one Spencer, that on October 4, 1898, Spencer, who was fire marshal in the district, having an office in Springfield, was called up by telephone by a person who reported that he was in the office of O. V. Coffin, president of the Middlesex Mutual Assurance Company, the defendant in one of the cases on trial; that Coffin desired him to notify Spencer that a fire had been reported to the company as having been sustained in Sandisfield on property covered by a policy of that company; that a Mr. Davis who would represent that company would go to Hartford the following day and meet Spencer and go to the place where the loss had occurred, to investigate and adjust the loss; that Davis was a representative of that company and that the person who was insured was one Mary E. Parker of Sandisfield; that on the next day the witness Spencer went to Hartford and met Davis as agreed upon by telephone and they proceeded to New



Marlborough to the house of Smith Jones where the plaintiff and her husband were stopping; that Spencer told the plaintiff that he was the fire marshal of this district; that Davis who was with him was a representative of the company which had sustained this loss, and that he had been sent there to investigate and adjust the loss; that Davis stated to Mrs. Parker that he was acting not only for the Middlesex company but for the Farmers' company, that the losses would be settled at the same time, and that the companies would settle both losses; and that this statement of Davis was made after considerable inquiry on the part of Davis as to the cause of the fire and the value of the property.

The plaintiff testified that she mailed to the defendant on October 31, 1898, the letter which is quoted in the opinion. It further appeared that the plaintiff received no letter from the defendant denying the authority of Davis.

*J. F. Noxon & A. C. Collins*, for the plaintiff.

*H. V. Cunningham & F. W. Brown*, for the defendant.

LORING, J. The exceptions in this case were taken at a second trial of the action against this defendant, which was before this court on exceptions taken when it was tried first together with a similar action against the Middlesex Mutual Assurance Company. (179 Mass. 528.) At the second trial the actions against both companies were tried, but exceptions taken in the action against this defendant only are before us.

1. The plaintiff's first claim is that on the evidence at this trial the jury were warranted in finding that the defendant company waived a compliance with the clause requiring that a statement in writing shall be forthwith rendered to the company by the insured.

This case differs from the former in this, that here there was testimony that Davis said that "the losses would be settled at the same time, and that the companies would settle both losses." But there is no evidence that Davis's action is binding on the defendant, and therefore it is not necessary to consider whether this would of itself have been a waiver; in which connection see *Boruszweski v. Middlesex Assur. Co.* 186 Mass. 589.

The plaintiff has undertaken to make out Davis's authority to act for the defendant by showing that she got no answer to a



letter written by her, dated October 31, "properly addressed and stamped to the Farmers' Insurance Company," in which she stated that "a man who said he represented your company and the fire marshal from Springfield, Mass., came here three days after the fire and saw my husband and myself, but did not look at the things we saved or go to the farm where the fire occurred. We have left the few things which we were able to save here at Mr. Smith Jones for your agent to view them, but they have not done so. I am here on expense and would like to move the goods away. Can I do so. Please let me know at once."

There is no statement in the letter which fairly can be taken to be a statement that the man came as an adjuster so as to make the defendant's silence an admission of the truth of that fact. We assume that if Davis had authority to adjust the loss any act of his dispensing with a written statement would have bound the defendant, as to which see *Little v. Phoenix Ins. Co.* 123 Mass. 880. But as Davis was not shown to have had authority to act for the defendant in adjusting this loss, it is not necessary to consider whether what Davis did, not followed by further participation in adjusting the loss, would have been enough to dispense with or postpone the rendering of the written statement called for by the policy.

2. On the other issue, namely, whether this clause was complied with, there is no material difference between the evidence here and that before the court in 179 Mass. 528.

*Judgment for the defendant on the verdict.*

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**MARY DANIELS vs. NEW ENGLAND COTTON YARN  
COMPANY.**

Bristol. January 16, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, Employer's liability.*

In an action by a girl employed in a factory against her employer for personal injuries, evidence that the plaintiff was of less than average intelligence is immaterial upon the issue of the defendant's negligence unless there also is evi-



dence that the defendant through its agents knew or ought to have known that she was of less than average intelligence.

If the proprietor of a factory posts notices in places where they can be read by the operatives warning them against wearing loose garments and flowing hair which may be caught in the machinery, he has performed his whole duty in this regard without calling the attention of the operatives to the notices or seeing that they read them thoroughly.

It is not the duty of the proprietor of a factory to warn a girl fourteen years and five months of age against the danger of wearing her hair hanging in a braid down her back so that it may be caught and wound up on a roller, if the girl herself knows that the rollers wind up thread, and means not to get any part of herself, her dress, sleeves, hair or anything else wound up in the rollers.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendant. At the trial in the Superior Court at the close of the evidence the judge directed a verdict for the defendant; and the case is before us on the plaintiff's exceptions.

At the time of the accident, on January 21, 1902, the plaintiff was fourteen years and five months old, and was four feet and eleven inches in height. She began work for the defendant on September 2, 1901, and was constantly employed on a "Foster Comb Winder," having been put in charge of one of the operators of that machine for the purposes of instruction. There were two of these comb winders placed end to end along the northerly side of the room in which the plaintiff worked. Each machine was about thirty feet long and about five feet wide. The machinery and mechanism were the same on each side. On the lower part of the frame were upright pins on which the operatives placed paper tubes with cotton thread wound on them called "cops." The thread from a pair of these cops was drawn upward and wound by a "winder" in a double strand upon a large paper tube, so as to form a large spool of thread. There were fifty of these spools which were placed end to end in a long row on each side of a winder, and there were two girls on a side, each tending twenty-five spools. There was a passage-way called the "winder alley" about two feet four inches wide between the comb winders and the side of the building. Next south of the winders, and in a line parallel with them, were placed several machines called twisters, and there was a passage-way called the "twister alley" between the winder and the twister, two feet and eleven inches wide.



When the cops became empty of cotton they often were drawn upward by the unwinding thread and off the pins on which they were placed, and they would fly off and fall to the floor, and it was the duty of the girls employed on the comb winders to pick them up. These empty cops would roll around on the floor; sometimes they went over the twister and sometimes they went under it.

When the plaintiff applied for employment she was dressed in a short skirt and wore her hair in a braid, the lower end of which came down to about the middle of her back. She wore it in the same way down to the time of the accident. She testified that there were three other girls, about her age, who wore their hair in the same way.

The accident happened while the plaintiff was working in the twister alley and while she was rising from a stooping position with one knee on the floor, with her back to the twister, engaged in picking up the empty cops from the floor. The end of her braid in some manner was wound around one of the long spool-bearing shafts of the twister, just as she arose to a standing position, and her entire scalp was torn from her head before the machine could be stopped.

Before she was employed in the mill, she had attended school for seven years, and there was evidence from her teachers that she was not of average intelligence, as she took seven years to complete a five years' course. For the purpose of showing that the plaintiff was below the average grade of intelligence two physicians who had attended her and observed her at the hospital almost continually from the day of the accident to the time of the trial, which was on May 7, 1903, and who were prepared to testify that they considered her below the average grade of intelligence, were asked the following question: "From your observation of her when she first came to the hospital and your observation since, apart from the injury and the consequences of it, what do you say as to whether or not she was of the average grade of intelligence?" This question was excluded; and the plaintiff excepted.

The accident in this case evidently was caused by the plaintiff's rising up from a stooping position in too close proximity to the twister. By so doing her hair was caught. If she was not



of average intelligence, this would bear on the question of her due care, but would not bear on the question of the defendant's negligence, unless the agent of the defendant who employed her, or some other agent during her employment, knew or ought to have known that she was of less than average intelligence. There is no evidence whatever of this. At the time of the accident she had worked in the mill for over four months without any mishap. She knew what her duties were, and had performed them well.

If we assume in favor of the plaintiff that there was evidence for the jury that the plaintiff was in the exercise of due care, the testimony of the physicians which was excluded is immaterial.

The only remaining question is whether there was evidence for the jury on the question of negligence on the part of the defendant, and we find none. It is not contended that there was anything out of order in the machines, or that they were placed improperly. The contention is that the plaintiff should have been warned of the danger of wearing her hair down her back. There are two answers to this contention. In the first place, the defendant had posted notices in different parts of the room in which the plaintiff worked, of which the eighth paragraph was as follows: "All employees while in the works are cautioned against wearing loose sacks, or loose or flowing sleeves, and all female employees are cautioned against wearing neckties or aprons having long ends or strings, or dresses which trail on the floor, or wearing their hair flowing or in hanging braids or in long curls." The plaintiff testified that she saw one of the notices, and read a part, but not the whole; that she read about the time for going to work and about a roller, but did not read the rest; that she knew it was a notice.

We are of opinion that an employer performs his whole duty where, as in this case, he posts notices in a place where they can be read by the employees; and that he is not obliged to call the attention of each operative to the notices. The notices in this case were printed in English, Portuguese, French and German, one card for each language. The plaintiff could read English, and while the notices were in small type, she could read them.

In the next place, the only instruction which it is complained was not given is that she should have been told that if she got



her clothes or hair against the machine or rollers she might get caught and wound up. If she knew the danger there was no need of instructing her in regard to it. *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 71. *McIntire v. White*, 171 Mass. 170. It clearly appears from the plaintiff's testimony that she knew that the rollers wound up thread, and that she did not mean to get any part of herself, her dress, sleeves, hair, or anything else wound up in the rollers.

There was no evidence to warrant a finding that the accident was caused by the failure of the defendant to perform a legal duty. *Silvia v. Sagamore Manuf. Co.* 177 Mass. 476, 479, and cases cited.

*Exceptions overruled.*

*M. R. Hitch & F. M. Sparrow*, for the plaintiff.

*A. J. Jennings*, (*A. E. Perry* with him,) for the defendant.



ARTHUR D. CURRAN & another vs. PAUL WHITIN  
MANUFACTURING COMPANY.

SAME vs. BAY STATE COAL COMPANY.

Suffolk. January 17, 18, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Practice, Civil, Exceptions.*

Where in a case tried before a judge sitting without a jury the evidence is conflicting the finding of the judge on a matter of fact is not open to revision by this court.

TWO ACTIONS OF CONTRACT by the same plaintiffs against different defendants, sufficiently described by the court. Writs dated April 10, 1903.

In the Superior Court the cases were tried before *Richardson, J.*, without a jury. In each case he found for the defendant: and the plaintiffs alleged exceptions.

*F. H. Smith, Jr.*, for the plaintiffs.

*A. P. Worthen*, for the defendants.



LATHROP, J. The first case is an action for an alleged breach of a contract to buy two hundred tons of coal in the year 1903. The evidence is set out at length in the bill of exceptions. It consists partly of certain communications in writing, and partly of conversations by means of the telephone. There is a dispute as to what was thus said. The judge apparently believed the defendant's testimony. If so, he was justified in finding that the contract was conditional on the receipt of the coal in two weeks, and there is no pretence that it was delivered in that time. Under these circumstances the finding of the judge on a matter of fact is not open to revision here. *Olivieri v. Atkinson*, 168 Mass. 28, and cases cited. No error of law appears. The plaintiffs' exceptions must be overruled.

*So ordered.*

The second case is similar to the first, and is governed by the same principles of law.

*Plaintiffs' exceptions overruled.*

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A. M. RICHARDS BUILDING MOVING COMPANY vs. BOSTON  
ELECTRIC LIGHT COMPANY.

Suffolk. January 17, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Electric Light Companies. Wires.*

Pub. Sts. c. 109, § 17, permitting, after a required notice, the cutting of telegraph and telephone wires in order to move a building or for any necessary purpose, was extended by St. 1883, c. 221, so as to give the same rights in regard to electric light wires. See now R. L. c. 122, § 28.

CONTRACT for \$150 deposited by the plaintiff with the defendant to cover the cost incurred by the defendant in cutting, removing and replacing the electric light wires of the defendant in a certain part of A Street in that part of Boston called South Boston, for the purpose of allowing the plaintiff to move a building through that street under a permit obtained from the proper authorities of the city of Boston. Writ dated May 18, 1899.

In the Superior Court the case was tried before *Hardy, J.*,



without a jury. It appeared that the defendant had refused to turn off its electric current in order that the plaintiff might cut the wires, and by agreement the money was deposited to cover the cost of the cutting of the wires by the defendant, with the stipulation that the money should be returned if under the circumstances the plaintiff had the right to cut the wires, and that if the plaintiff had no right to cut the wires the defendant should be allowed a reasonable compensation for the cutting.

At the close of the evidence the defendant requested the judge to rule: 1. That upon all the evidence the plaintiff cannot recover, and 2. That Pub. Sts. c. 109, § 17, as extended by the St. 1883, c. 221, does not apply to electric light companies.

The judge refused to rule as requested. He found for the plaintiff, and assessed damages in the sum of \$195.20. The defendant alleged exceptions.

*J. Gordon*, for the defendant.

*T. H. Buttiner*, (*A. L. Richards* with him,) for the plaintiff.

LATHROP, J. The only question in this case which has been argued is whether the Pub. Sts. c. 109, § 17, as extended by the St. of 1883, c. 221, applies to electric light companies, and we are of opinion that it does.

The Pub. Sts. c. 109, applies only to the transmission of intelligence by electricity; and § 17 reads as follows: "Whoever in order to move a building or for any necessary purpose desires to cut, disconnect, or remove the wires of any such company, may do so, exercising reasonable care, if he has first left a written statement signed by him, of the time when and the place described by reference to the crossings of streets or highways where he wishes to remove said wires, at the office of the company in the town where such place is situated, twenty-four hours before the time so stated, or, when there is no such office, if he has deposited such statement in the post-office, properly prepaid and directed to the company at its office nearest to said place, three days before the time mentioned in said statement." This section goes back to the St. of 1869, c. 141, § 1.

The St. of 1883, c. 221, § 1, reads as follows: "All provisions of law granting to persons and corporations authority to erect, lay and maintain and to cities and towns authority to regulate telegraph and telephone lines, except" §§ 16 and 18 of c. 109 of



the Pub. Sts., "shall, so far as applicable, apply to lines for the transmission of electricity for the purpose of lighting."

The St. of 1895, c. 350, § 1, reads as follows: "All provisions of law granting to persons and corporations authority to erect, lay and maintain, and to cities and towns authority to regulate telegraph, telephone and electric light lines shall, so far as applicable, apply to lines for the transmission of electricity for the purposes of heating or power, except lines for heat or power used by street railway companies. And the provisions of" the St. of 1887, c. 382, "and of acts in amendment thereof and in addition thereto are hereby extended to such lines for heating and power, except lines for heat or power used by street railway companies."

All of these statutes were in force when the occurrence happened referred to in the bill of exceptions.

The right granted by the Pub. Sts. c. 109, was by § 2 expressly made subject to the provision that the company should not "incommode the public use of highways or public roads." The moving of a building, when permission is obtained from the proper authorities, is a use of the highway recognized by § 17; and the granting of the right to maintain such lines was subject to the public use of the highway for other purposes, and subject to the right to have the lines or wires cut as provided in § 17. The St. of 1883 and the St. of 1895, making the provisions of law for maintaining telephone and telegraph lines applicable to lines for the conduct of electricity for the purposes of lighting, heating or power, in our judgment make them subject to the provisions of the Pub. Sts. c. 109, §§ 2, 17, as both sections relate to the maintaining of such lines. The plaintiff, therefore, having obtained permission from the local authorities, and having given the proper notice, had the right to cut the wires.

The view taken by us is the view taken by the commissioners for consolidating the Public Statutes. See Report of Commissioners, c. 122, and notes. And it is the law to-day. R. L. c. 122, § 28. The words "any such company" refer to any company mentioned in § 1.

The defendant relies upon a remark of Chief Justice Field in *Hector v. Boston Electric Light Co.* 161 Mass. 558, as to the effect of the St. of 1883, c. 221, on the Pub. Sts. c. 109, § 12. The remark however does not apply to § 17. *Exceptions overruled.*



**FRED I. WRIGHT vs. ALONZO W. PERRY.**

Suffolk. January 20, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Landlord and Tenant. Negligence, Contributory, In maintaining freight elevator. Elevator.*

The lessee of an entire building sublet to various tenants is under an obligation to a master teamster directing the unloading of a truck load of goods for delivery to one of the tenants to have the premises reasonably safe for such a lawful purpose.

If a freight elevator at its opening on a street is protected by an automatic gate designed to bar the entrance when the elevator is not there, and a master teamster about to direct the unloading of a truck load of goods sees the gate of the elevator raised indicating that the elevator is in place and, relying on this as he slips in trying to move a box out of the way, steps back where he supposes the elevator to be, it being "somewhat dark in there," and falls down the elevator well to the basement, he can be found to be in the exercise of due care.

It is evidence of negligence on the part of the proprietor of a freight elevator toward a person lawfully on the premises, that originally the entrance to the elevator was closed by a sliding door and that this was removed and replaced by a second hand gate with an automatic arrangement for closing the gate when the elevator went up, which did not work well, sometimes coming down when the elevator went up, and sometimes not, that the platform adjoining the entrance to the elevator had a hole in it, and that repeated complaints had been made to the agent of the proprietor in charge of repairs in the building both of the hole in the platform and of the condition of the elevator gate.

TORT for personal injuries from falling into a freight elevator well alleged to have been maintained negligently in an unsafe condition in a building controlled by the defendant. Writ dated March 21, 1902.

At the trial in the Superior Court *Maynard*, J. refused to order a verdict for the defendant, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$3,500, of which the plaintiff afterwards remitted all in excess of \$2,500. The defendant alleged exceptions.

*A. N. Rice*, for the defendant.

*S. J. Elder*, (*J. H. Pugh* with him,) for the plaintiff.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff, by falling into an unguarded elevator well at 113 Franklin Street, Boston, on January 6, 1902. At



the trial in the Superior Court the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The first two exceptions have not been argued, and we treat them as waived.

The remaining exception is to the refusal of the judge at the close of the evidence to direct a verdict for the defendant. We are of opinion that the judge rightly refused to rule as requested, and that the case was properly submitted to the jury.

The defendant was the lessee of the entire building in which the accident happened. He sublet the building to various tenants, for business purposes, retaining control of the elevator and its approaches. Two iron tracks ran from Franklin Street to a platform at the entrance of the elevator. This platform originally had a covering of iron, which had become worn and loose and had been removed some days before the accident. There was a hole in the wooden planks of the platform. The elevator well was protected by an automatic freight elevator gate, which rose when the elevator was in place for use and descended to bar the entrance when the elevator ascended.

The plaintiff was a master teamster, and part of his regular business was then, and for several years had been, to take goods to and from the Linen Thread Company, a corporation which occupied the basement and the first floor of the premises.

On the day of the accident the plaintiff went with two of his teamsters to deliver a load of goods to the Linen Thread Company. One truck load of the goods was unloaded from the truck across the platform by the teamsters into the elevator, the plaintiff standing by and looking on. The plaintiff went for a second load and came back with it, and noticed a case of paper for another tenant in the building lying across the platform. The plaintiff stepped on to the platform, and started to move the box of paper. One of his feet caught in the hole in the platform, and he slipped. He stepped back with his other foot, supposing the elevator was in position for use, and fell into the elevator well.

These are the general facts. There was also evidence that originally the elevator entrance had been closed with a sliding door. Some months before the accident this sliding door had been removed, and the gate put in. This gate was a second hand



one, and there was evidence that the automatic arrangement did not work well; sometimes it would come down when the elevator went up, and sometimes it would not. There was evidence also of repeated complaints to the agent of the defendant who had charge of his repairs, not only of the hole in the platform, but of the condition of the elevator gate.

1. There can be no doubt that the plaintiff was lawfully on the defendant's premises, for the purpose of business with one of the tenants of the defendant, and, as such, had the right to have the premises reasonably safe. *Gordon v. Cummings*, 152 Mass. 513. *Marwedel v. Cook*, 154 Mass. 285. *Drennan v. Grady*, 167 Mass. 415. *Coupe v. Platt*, 172 Mass. 458. See also *Plummer v. Dill*, 156 Mass. 426; *Sears v. Merrick*, 175 Mass. 25, 31.

2. We are of opinion that the question whether the plaintiff was in the exercise of due care was for the jury. It is argued that he ought to have ascertained whether the elevator was in place before attempting to remove the case of paper. But he testified that at the time he saw this case he "noticed that the elevator gate was up, and in such position that the elevator ought to have been there." It was also in evidence that it was somewhat dark in there. Under all the circumstances of the case, we cannot say as matter of law that the plaintiff was not in the exercise of due care. The plaintiff had a right to rely on the fact that the elevator gate was up. The case in this respect is very similar to *Carey v. Arlington Mills*, 148 Mass. 388.

3. There was abundant evidence in the case of the defendant's negligence, which we already have stated and need not repeat. *Harrison v. Jelly*, 175 Mass. 292.

*Exceptions overruled.*



JAMES F. CHASE vs. NEW YORK LIFE INSURANCE  
COMPANY.  
SAME vs. SAME.

Suffolk. January 20, 23, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & LORING, JJ.

*Insurance, Life. Contract, Construction.*

- . A contract in writing between a life insurance company and one of its agents provided, that, if the agency continued for one year and was not terminated by the company for a violation of the agreement by the agent, the agent should be entitled to renewal commissions on policies effected by him which accrued after the termination of the agency provided the agent should "not be engaged in the business of life insurance for any other company, in any capacity whatever, in the State of Massachusetts, during the maturity of said renewal commissions." The agent after more than a year of service was discharged by the company without cause, and within a month thereafter entered the employ of another life insurance company having its office in Boston. In an action by the agent on the contract for renewal commissions thereafter accruing on policies effected by him, it was *held*, that he could not recover, there being no agreement to pay him commissions on renewal premiums after he had entered the employ of a competitor.

LATHROP, J. These are two actions of contract, in each of which the plaintiff seeks to recover as damages for an alleged breach of a contract in writing, his commissions upon renewal premiums received by the defendant upon policies of life insurance, procured by the plaintiff while acting as agent of the defendant. The two cases were tried together without a jury before the late Chief Justice of the Superior Court, who in both cases found for the defendant, and in one case found for it in a certain sum on a declaration in set-off. The case is here on exceptions by the plaintiff. No question arises concerning this declaration in set-off, and the only question is as to the right of the plaintiff to his commissions on the renewal premiums; and this depends upon the construction of the contract.

The writs have different dates, and we assume that they cover different periods of time.

The contract in question was entered into on January 14, 1898, for the term of one year. It subsequently was extended by written



agreements to January 14, 1901. The plaintiff worked under the contract from its date, obtaining applications for life insurance upon which the defendant issued its policies, until he was discharged on August 13, 1900. This discharge was found by the court below not to be for cause.

On September 8, 1900, the plaintiff entered the employ of the United States Life Insurance Company, having its offices in Boston, and was so acting as manager at the time of bringing these actions. It was for so acting that a finding was made for the defendant in the Superior Court.

The second article of the contract provided: "It is agreed that the said party of the second part [the plaintiff] shall act exclusively as agent for said party of the first part [the defendant], and as such agent shall devote his entire time, talents and energies to the business of the agency hereby established."

By the sixth article, the district within which the plaintiff was to operate was Boston and vicinity.

The twenty-first article of the contract reads as follows: "It is agreed that said party of the second part shall be allowed, under this agreement, the following compensation only, unless otherwise expressly stipulated in writing, namely, a commission on the original or renewal cash premiums, which shall, during his continuance as said agent of said party of the first part, be obtained, collected, paid to and received by said party of the first part up to and including the fifth year of assurance (should his agency continue so long) on policies of insurance effected with said party of the first part, by or through said party of the second part, which commission shall be at and after the following rates." Then follows a table of the rates which is not material to the consideration of the question presented.

The twenty-fourth article of the agreement reads as follows: "It is agreed that the renewal commissions which shall not have accrued at the termination of the agency created by this agreement shall, as they accrue thereafter, be passed to the credit of said party of the second part, if living, and in case of his death to his legal representatives, under the terms of this agreement; provided, however, said agency shall continue for the period of one year from date hereof, and that said agency shall not be terminated by said party of the first part for a violation of this



agreement by said party of the second part, and that said party of the second part shall not be engaged in the business of life insurance for any other company, in any capacity whatever, in the State of Massachusetts, during the maturity of said renewal commissions."

In each case the Chief Justice made the following ruling: "This case does not involve the question whether a contract not to be engaged in the business of life insurance for any other company in Massachusetts could be enforced or would be void. There is no contract to pay or credit commissions on renewal premiums after the plaintiff entered or engaged in life insurance business for another company in Massachusetts."

None of the numerous cases cited by the counsel for either side contains a clause similar to the twenty-fourth article, and we must decide this case upon general principles of law applicable to the contract before us.

It is obvious at the outset that all the clauses must be considered together, and that the twenty-first clause applies only during the continuance of the plaintiff as agent, for five years. There are many cases which hold that under such a clause, the plaintiff cannot recover after he ceases to act as agent. *Stagg v. Connecticut Ins. Co.* 10 Wall. 589. *Jacobson v. Connecticut Ins. Co.* 61 Minn. 380. *King v. Raleigh*, 100 Mo. App. 1. *Ballard v. Traveller's Ins. Co.* 119 N. C. 187. Whether, if this cause stood alone, the plaintiff could recover, having been discharged without cause, is a question we need not decide, for it is to be construed in connection with the twenty-fourth article. This article begins with a general agreement as to renewal premiums, but this is subject to three provisos. We may assume that the first two provisos do not stand in the way of the plaintiff's recovery, but the third proviso cuts down the plaintiff's right of recovery to the case of his not being "engaged in the business of life insurance for any other company, in any capacity whatever, in the State of Massachusetts, during the maturity of said renewal commissions."

As the plaintiff sues upon the contract he must abide by its terms. His right to commissions on renewal premiums depended upon his abstaining from engaging in the business of life insurance in any capacity in the State of Massachusetts. He chose



to engage in such business, and we find no agreement in the contract to pay him commissions on renewal premiums, in case he chose to become a competitor of the defendant.

*Exceptions overruled.*

*C. F. Perkins & E. N. Curtis*, for the plaintiff.

*W. A. Morse*, for the defendant.



ELIZABETH BARNES vs. WALTER G. HUNTLEY, administrator.

Suffolk. January 24, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Res Judicata. Equity Jurisdiction.*

A final decree dismissing a bill in equity, from which no appeal was taken, is a bar to another bill between the same parties for the same cause of action, and the plaintiff cannot avoid the defence of *res judicata* by seeking to maintain the suit on grounds different from those mentioned in the former bill.

LATHROP, J. This is a bill in equity, filed in the Superior Court on March 3, 1902, against the administrator of the estate of Nelson H. Bush, to enforce an oral trust alleged to have been made on February 1, 1881, by the terms of which the plaintiff delivered to Bush \$550, to be invested and re-invested, under an agreement to pay over to the plaintiff from time to time, as her wants should lead her to request, any income from such investment, and the whole amount thereof, with all accumulations, on her demand.

The bill contained numerous other allegations showing breaches of the trust and payments to her of certain sums on demand. The prayer of the bill was for an account, and that the defendant be required to pay over to the plaintiff any money and any other property belonging to the plaintiff.

The defendant pleaded a former adjudication upon a bill in equity filed in the Superior Court on April 27, 1900, by the same plaintiff against the same defendant, for the same cause of action, which, after a full hearing on its merits, was dismissed by the Superior Court on July 1, 1901; and a final decree was entered.



On issue joined on this plea, a commissioner was appointed to take the evidence; and a full report of the evidence was made. Upon all the evidence the judge of the Superior Court found that the plaintiff's bill in the case at bar was for the recovery of the same rights, claims and causes of action as were set forth in the former suit, sustained the plea in bar, and entered a final decree dismissing the bill with costs. The case is before us on an appeal by the plaintiff from this decree.

It appears in the record before us that in order to avoid encumbering the record with a mass of evidence, the parties agreed that the parties in this suit are the same persons who were parties in the former suit; that the defendant is sued in this cause in the same capacity and as administrator of the same estate as in the former suit; and that the sum of \$550 specified in the plaintiff's bill in this suit is the same as that specified in the former bill.

A comparison of the two bills shows that, while the present bill is somewhat longer than the original bill, the cause of action is the same. The "petitory conclusions" of the two bills are the same, namely, an accounting and paying over of what may be found due.

It seems to us plain that the plaintiff was bound to bring forth all her grounds of attack at once; and that she cannot in this bill seek to maintain it on grounds different from those mentioned in the former bill. She has had her day in court, and a full trial of her case, and a decree against her, from which she took no appeal. The matter is *res adjudicata*. *Hoseason v. Keegen*, 178 Mass. 247, and cases cited.

*Decree affirmed.*

*T. H. Talbot*, (*G. H. Ross* with him,) for the plaintiff.

*T. J. Boynton*, for the defendant.



ALPHONSO LINTON vs. WEYMOUTH LIGHT AND POWER  
COMPANY.

Norfolk. March 7, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Negligence. Electric Light Company. Wires. \**

In an action against an electric light company for injuries from coming in contact with one of its wires charged with electricity, if it appears that the wire carried an alternating current of thirty-five hundred volts and that a current of one thousand volts is dangerous to life, that at the place of the accident the wire, though supported on poles, ran through branches of trees likely to come in contact with the wire and rub off the insulation, that the insulation consisted of a rubber cloth covering which it would not take long to rub off, and that there was a better method of insulation for wires going through trees, the question whether the defendant was negligent in not using the better method of insulation is for the jury.

In an action against an electric light company for injuries from coming in contact with one of its wires charged with electricity, if there is evidence that a wire which might have caused the accident had broken three hundred and twenty-five feet from the place of the accident, and that the defendant's superintendent had been notified by telephone of this break ten minutes before the accident and had promised to send a man to attend to it, and if there also is evidence that at the place of the accident a wire hung down over the gutter next to the sidewalk where the plaintiff was walking, in a loop within five or six feet of the ground, the question of the defendant's negligence should be submitted to the jury.

In an action against an electric light company for injuries from coming in contact with one of its wires charged with electricity, if it appears that the plaintiff at about half past nine o'clock in the evening, after boasting about his knowledge of electricity and poking a broken wire from the gutter to the sidewalk and back again with his umbrella, started to walk along the sidewalk, and that a loop of the same wire was hanging down between two poles about half way to the ground over the gutter adjoining the sidewalk, and if there is evidence that the wind at the time was blowing eleven miles an hour, and the plaintiff contends that the loop of wire was blown against him, while the defendant contends that the wind was not strong enough to blow the loop over the sidewalk and that the plaintiff meddled with the wire while it hung over the gutter, it is for the jury to decide on all the evidence in the case which theory is correct and whether the plaintiff was in the exercise of due care.

TORT for personal injuries from coming in contact with a wire charged with electricity, alleged to have been maintained negligently by the defendant, a corporation furnishing electricity for street and house use, while the plaintiff was walking on the



easterly sidewalk of Main Street in that part of Weymouth called South Weymouth at about half past nine o'clock on the evening of October 29, 1899. Writ dated August 4, 1900.

At the trial in the Superior Court *Bishop*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*G. R. Swasey & A. P. Worthen*, for the plaintiff.

*J. Lowell & J. A. Lowell*, for the defendant.

LATHROP, J. We are of opinion in this case that there was evidence sufficient to submit to the jury, both on the question of negligence on the part of the defendant, and of due care on the part of the plaintiff.

The wire with which the plaintiff came in contact was one for supplying power for house lighting, and carried an alternating current of thirty-five hundred volts, while a current as high as one thousand volts was dangerous to life, as the superintendent of the defendant company testified. At the place of the accident the wire, though supported on poles, ran through branches of trees, and this the superintendent testified was a very unsatisfactory way; that the limbs are apt to come in contact with the wires and rub off the insulation; that the insulation of this wire was of rubber cloth covering; and that it would not take a very long time to rub off this covering. There was also evidence that there was a better method of insulation when wires went through trees, and the question whether better insulation should have been used was for the jury.

There was evidence that a wire, which the jury might have found to be the same wire, had broken three hundred and twenty-five feet from the place of the accident; and that the superintendent had been notified by telephone of this break ten minutes before the accident, and had promised to send a man to attend to it. The superintendent denied receiving this communication, but whether he did receive it or not was a question for the jury, and it was also a question for them whether, if he did receive it, he ought at once to have shut off the power. See *Lutolf v. United Electric Light Co.* 184 Mass. 53.

There was evidence that at the place of the accident the wire hung down over the gutter next to the sidewalk where the plaintiff was walking, in a loop within five or six feet of the ground. In *Thomas v. Western Union Telegraph Co.* 100 Mass. 156, it was



said by Mr. Justice Hoar : " The fact that a telegraph wire is found swinging across a public way, at such a height as to obstruct and endanger ordinary travel, is in itself, unexplained and unaccounted for, some evidence of neglect on the part of the company whose duty it is to keep it in a proper and safe position, and should have been submitted to the jury."

There are other grounds upon which the plaintiff contends that the case should have been submitted to the jury on the question of the defendant's negligence, but we have stated enough to show that this question was for the jury.

The question whether the plaintiff was in the exercise of due care is more doubtful ; but on the whole we are of opinion that this also was, under all the circumstances of the case, a question for the jury. About an hour before the accident, the plaintiff saw the broken wire emitting sparks from time to time, and he remained there watching it ; he made various boasts about his knowledge of electricity, and poked the wire from the gutter on to the sidewalk with his umbrella ; and when requested by a deputy sheriff to move it back into the gutter he did so. After about half or three quarters of an hour he started for his destination on the same side of the street. He had seen another person leave about two minutes before he did, going in the same direction. Then something happened to him, he did not know what. He testified that he did not leave the sidewalk, and paid no attention to the wires. The witness who left two minutes before he did testified that he saw a loop of the same wire that had emitted sparks, hanging down between two poles, about half way to the ground. The plaintiff was found in an unconscious condition on the sidewalk, with his hands grasping the wire. He was severely burned before he could be rescued. The theory of the plaintiff is that the loop was blown by the wind, which there was evidence was at that time eleven miles an hour, across the sidewalk, and that he came in contact with it. The theory of the defendant was that the plaintiff was walking near the edge of the gutter and meddled with the wire while it hung over the gutter, and that the wind was not strong enough to blow the loop over the sidewalk. Which theory was correct was for the jury upon all the evidence in the case. See *Bourget v. Cambridge*, 156 Mass. 391 ; *S. C.* 159 Mass. 388.

*Exceptions sustained.*



## ALICE G. RICHARDSON vs. ALBERT L. GORDON.

Suffolk. March 10, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Landlord and Tenant. Covenant.*

A provision in a lease, that in case the lessor has entered for a breach of condition he may let the premises to another at the risk of the lessee holding him responsible for the rent but crediting him with sums actually realized, has no application to the liability of the lessee for rent accruing before the entry, and it is no defence to an action for such back rent, that the lessor by making a new lease after entry for breach of condition has received more rent for the whole period of the first lease than he would have received had there been no breach of condition by the original lessee.

In an action on a covenant in a lease to pay "all taxes and assessments, to which the premises or any part thereof may become liable during said term," if it appears that the defendant failed to pay taxes assessed on the premises for the term of the lease, whenever payable, and that the premises had been sold for non-payment of taxes for one of the years of the term, the plaintiff is entitled to recover without showing that he has paid the taxes or that he has redeemed the property from the tax sale.

LATHROP, J. This is an action of contract on the covenants of a lease, for the rent of certain premises in Boston for twenty-nine days during the month of September, 1902, and taxes for the years 1900, 1901 and 1902, together with interest. At the trial in the Superior Court, a verdict was ordered for the plaintiff for rent for twenty-nine days in September, 1902, and for the taxes for the years 1900 and 1901, with interest thereon to the date of the verdict, and for five-twelfths of the taxes for the year 1902, with interest to the date of the verdict. The case comes before us upon a report of the judge who tried the case.

The facts in the case are that on December 4, 1894, the plaintiff and the defendant entered into an indenture of lease by which the plaintiff let to the defendant from January 31, 1895, at the rental of \$8,500 a year, payable in equal monthly payments of \$708.34, on the last day of each month during the term, "and in like proportion for any fraction of a month unexpired at the legal termination of this indenture, the first payment to be made on the last day of February next." The defendant also covenanted to pay the rent "and also all taxes



and assessments whatever to which said premises or any part thereof may become liable during said term."

The defendant entered and occupied the premises under the lease, up to September 30, 1902, on which day the plaintiff made an entry under a stipulation in the lease, for non-payment of rent and taxes. At the time of the entry, the rent for August, 1902, was due and unpaid, and the taxes for 1900, 1901 and 1902 were due and unpaid, and the property had been sold by the city of Boston for the taxes of 1900. The rent for August was sued for and recovered in another action. The defendant admitted his liability unless certain facts constituted a defence which entitled him to go to the jury. These we will consider, so far as they were relied upon at the argument.

1. The defendant sublet the premises by a lease to one Bailey, beginning March 1, 1896, for the balance of the defendant's term, at the rate of \$12,468 per year, without taxes. On December 8, 1898, the plaintiff leased the premises to said Bailey for a term of four years, beginning at the expiration of the lease to the defendant; and there was a supplementary written agreement that if the lease to the defendant should be determined at any time for breach of condition the lease from the plaintiff to Bailey should begin from that time. The rent reserved by this lease was \$10,000 per year, the lessee agreeing also to pay the taxes. After the entry, Bailey paid rent to the plaintiff under the lease from the plaintiff to him, and at the time of the trial had paid rent for two years, namely, from October 1, 1902, to October 1, 1904, being the sum of \$20,000. In that interval Bailey also paid the taxes for 1903, and paid the plaintiff the seven-twelfth of the taxes for 1902.

The defendant contends that the plaintiff thus received \$3,000 in excess of the rent which would have been payable by the defendant for the same period. This contention is based upon a clause of the lease, following the usual clause as to the lessor's right to enter for breach of condition, and which reads as follows: "And thereupon the lessor may, at discretion, relet the premises, or any part thereof, at the risk of the lessee, who shall remain for the residue of the term responsible for the rent, taxes and water rates herein reserved, and shall be credited with such sums only as shall be by the lessor actually realized."



The short answer to this contention is that the plaintiff is not seeking to recover from the defendant for rent accruing after the entry for breach of condition, but for rent before the entry, to which the clause of the lease above cited has no application.

2. The defendant further contends that the plaintiff was in fault in making the lease to Bailey at the rent reserved thereby, and that he, the defendant, should be credited with consequent loss of rents. The answer to this is the same as that to the last contention, and it also may be added that it does not appear that the plaintiff could have obtained a larger rental, or that the rental reserved was not a fair rental.

3. The defendant contends that as the plaintiff has not paid to the city of Boston the taxes which she seeks to recover, and has not redeemed the property from the tax sale for the taxes of 1900, she cannot maintain the action for the taxes.

In Boston taxes are assessed during the month of August, and relate back to the first of May. They are payable in October, and after that month, if not paid, interest is added.

We see no ground for relieving the defendant from paying the taxes. In *Wilkinson v. Libbey*, 1 Allen, 375, it was said by Mr. Justice Merrick: "The promise contained in the covenant is not, as seems to be supposed by the defendant, to pay the taxes and assessments which shall or may be payable during the term, but those which may be payable for or in respect of the premises during the term, at whatever period of time they shall become or be payable." See also *Amory v. Melvin*, 112 Mass. 83, 87.

Nor is it necessary that the plaintiff should pay the tax to the city to entitle her to maintain this action. The promise is not one of indemnity against the tax, but a promise to pay it. *Sargent v. Pray*, 117 Mass. 267. *Bowditch v. Chickering*, 139 Mass. 283, 288.

In respect to the contention of the defendant that the plaintiff cannot recover the taxes of 1901 and 1902, because, the property having been sold for the taxes of 1900 and not redeemed, neither the plaintiff nor any property of hers is liable therefor, it does not clearly appear from the report that any such point was taken in the court below, or is open on the report. The entry was made on September 30, 1902; and before that time the sale for the taxes of 1900 had been made, but when is not



stated. The trial was in October, 1904, and the bill of exceptions states that the plaintiff has not redeemed the property from the tax sale. We do not think that enough appears to show that the taxes were not properly assessed to the plaintiff. For aught that appears the sale may have been made shortly before the entry, in which case the taxes for 1901 and 1902 properly would be assessed to the plaintiff. While the plaintiff has not redeemed, it does not lie in the mouth of the defendant to set up such a defence. He is sued upon his covenant, and has broken it. The verdict was right.

*Judgment on the verdict.*

*C. R. Darling*, for the defendant.

*H. N. Shepard*, for the plaintiff, was not called upon.

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COMMONWEALTH vs. EDWARD CONLIN & another.

Suffolk. April 3, 1905. — May 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Burglarious Implements. Housebreaking.*

Two defendants indicted under R. L. c. 208, § 41, for having in their possession tools and implements designed for committing burglary with intent to use them for that purpose, properly may be found guilty if it appears that the implements described in the indictment were found in a bag, to which one of the defendants had a key, in a room hired by another person, that the defendants were in the house with that person on the day on which the bag was found and went out of the house with him and afterwards returned without him, asking for the bag, that they gave a false account of the whereabouts of the person who hired the room, and disclaimed all knowledge of the bag and its contents, that when asked what they used certain revolvers and fuses for they made no answer, and when asked what use they made of a certain rubber bag, afterwards shown to contain nitroglycerine, one of them jumped back in such a way as to indicate that he knew what was in it and made no answer.

INDICTMENT, found and returned in the Superior Court for the county of Suffolk on November 12, 1904, alleging that the defendants, Edward Conlin and Frank Nelson, on October 21, 1904, at Boston "did knowingly have in their possession certain engines, machines, tools and implements adapted and designed



for cutting through, forcing and breaking open buildings, rooms, vaults, safes and other depositories, in order to steal therefrom such money and other property as might be found therein, the said Conlin and Nelson knowing said engines, machines, tools and implements to be adapted and designed for the purpose aforesaid, and intending to use and employ them therefor."

The defendants were tried before *Holmes, J.* who refused certain requests of the defendants for instructions as described in the opinion, and ruled as there stated. The jury returned a verdict of guilty against both defendants; and the defendants alleged exceptions.

*M. J. Creed & J. P. Crosby*, for the defendants.

*F. H. Chase*, Second Assistant District Attorney, for the Commonwealth.

*LATHROP, J.* The statute under which the defendants were indicted, R. L. c. 208, § 41, had its origin in the St. of 1853, c. 194, and has been in force ever since. Gen. Sts. c. 161, § 84. Pub. Sts. c. 203, § 86. Since it was enacted but two cases under it have been before this court, *Commonwealth v. Tivnon*, 8 Gray, 375, and *Commonwealth v. Day*, 138 Mass. 186. The first case decided, among other points, that the offence could be committed in concert by two or more persons; that it was not necessary to prove either that the defendants were possessed of all the implements described, or that all of them were designed or adapted to effect the objects charged in the indictment; that it was not necessary that it should appear that the tools or implements were originally made or intended for an unlawful use, it being enough that they were suitable for the purpose; and that the possession might be actual or constructive. Mr. Justice Bigelow then goes on to define constructive possession, as follows: "It would be proved by evidence that the implements were held by one for himself and as agent for another; that they were jointly bought and owned, but kept by one only, or procured and held by one by mutual agreement or at the request of another; or that they were deposited in some place mutually agreed on, to which either could resort at pleasure." There is another point decided in the case, to which we shall refer later.

The case of *Commonwealth v. Day*, 138 Mass. 186, has but slight application to the case before us.



The defendants filed numerous requests for instructions, none of which was given in terms, although some of them were covered by the charge, which dealt with the case fully and adequately.

The first three requests for instructions amount to a request that there was no sufficient evidence to warrant a verdict of guilty against either defendant. The defendants rely upon a point decided in *Commonwealth v. Tivnon*, *supra*, that proof of possession of burglarious implements by one person, he and another intending to use them in a joint undertaking, is not sufficient to show the possession of both. The jury were so instructed in the case before us. The jury also were instructed that if the defendants were merely messengers to obtain the bag they could not be found guilty. On the evidence in the case we are of opinion that the jury might have found that both defendants had constructive possession of the bag, and that it was in their control before it was interfered with by the police officers. There was evidence that the defendants had been in the house that day with Wright, who hired the room where the bag containing the implements was found, and went out with him. The key of the bag was found in Conlin's possession. The defendants came after the bag. Nelson was seen going out of the house a short time before he returned with Conlin for the bag. The defendants gave a false account of the whereabouts of Wright, and disclaimed all knowledge of the bag and its contents. When they were asked what they used the revolvers and fuses for they made no answer. When they were asked what they used the rubber bag for, Nelson "got back as quick as that," and made no answer. This bag was shown afterwards to contain nitroglycerine; and Nelson's action showed that he was well aware of what was in the bag.

The jury might well have found that the defendants were the owners of the bag and its contents, and employed Wright to hire the room and put the bag there, where it was subject to their control.

The other requests for instructions, so far as relied upon in the defendants' brief, are sufficiently covered by the charge.

*Exceptions overruled.*



STEPHEN JENNINGS vs. CHARLES E. WYZANSKI & another,  
trustees, & others.

Suffolk. December 1, 2, 1904. — May 22, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Pledge, Redemption. Equity Jurisdiction, To redeem from pledge.*

A pledge of four successive mortgages upon the same land was made to secure the payment of a certain note, by an instrument in writing giving the pledgee the right to sell the collateral security and to foreclose the mortgages or any of them at public or private sale, the pledgee having the right to purchase at the sale. The note was not paid at maturity, and the pledgee assigned the note and the four mortgages to his agent or attorney, who by instruction of the pledgee proceeded to foreclose one of the mortgages under a power of sale contained in it. At the sale the pledgee bid in the property and had it conveyed to a person for his benefit. No money was paid by any one and no payment was indorsed on the note or credited to the pledgor. The pledgor then filed a bill to redeem. *Held*, that he was entitled to redeem the three unexpired mortgages and the proceeds of the mortgage that had been foreclosed; that the foreclosure sale was good and the pledgee had a right to purchase under it, but that the net proceeds of the sale were to be applied toward the payment of the note of the pledgor, and the pledgee was ordered on payment of the balance of the note to assign the other three mortgages to the pledgor.

BARKER, J. The case comes here upon the plaintiff's appeal from a final decree dismissing the bill with costs. After the bill had been amended several times and the parties finally were at issue the case was heard by a judge of the Superior Court, the evidence being taken and reported by a commissioner under Chancery Rule 35.

At the trial some questions of evidence were raised by the plaintiff who excepted to certain rulings against him on those questions, but as no bill of exceptions was filed we do not consider those questions open upon the appeal.

Many of the facts alleged by the bill are admitted by the answers. The whole evidence being before us the question for decision is whether upon the facts which upon the pleadings are to be taken as admitted and those which should be found upon the evidence the decree was right; and if the decree was not right what decree should be entered. The appeal brings here all inferences of fact as well as conclusions of law. *Parks*



v. *Bishop*, 120 Mass. 340. *Wright v. Wright*, 13 Allen, 207. *Stockbridge Iron Co. v. Hudson Iron Co.* 102 Mass. 45, 47. See *Ross v. Harper*, 99 Mass. 175; *Smith v. Townsend*, 109 Mass. 500; *Mason v. Lewis*, 115 Mass. 834. At the same time the decision of the court below is not to be reversed upon questions of fact unless clearly shown to be erroneous. *Allen v. Allen*, 117 Mass. 27, 29. *Slack v. Slack*, 123 Mass. 443.

As finally amended the bill is one to redeem certain property from the lien created by a pledge, or from titles made by the pledgees by proceedings which the defendants contend were authorized by the terms of the pledge. When first pledged the property consisted of four mortgages upon a parcel of land on Harvard and Albany Streets in Boston. Since the pledge was made one of these mortgages, the fourth in order of procedure as liens upon the land, has been foreclosed by a sale under a power contained in it. The other three mortgages remain as such, unforeclosed.

The pledge was made by the plaintiff on August 15, 1903, to the defendants Wyzanski, by a promissory note of that date signed by the plaintiff, by which he promised to pay the Wyzanskis or order, \$16,500 with interest at five per cent per annum, two months after date, which note contained these further statements, namely: "I having deposited with this obligation, as collateral security, four certain notes given for \$4,000, \$4,000, \$5,500, and \$28,500, dated March 15, 1898, July 1, 1892, October 25, 1895, and January 7, 1901, and secured by mortgages recorded with Suffolk Deeds, Book 2070, Page 70; Book 2315, Page 418; Book 2513, Page 116; Book 2729, Page 115; which notes and mortgages are herewith assigned to said M. E. and C. E. Wyzanski with authority to sell this note and said collateral security, and to foreclose said mortgages, or either of them, without notice, either at public or private sale, at the option of the holder or holders hereof on the non-performance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining, after paying all sums due from me to the said holder or holders. And it is further agreed that the holder or holders hereof may purchase at said sale."

The note was not paid at its maturity and on October 21, 1903, for a money consideration the Wyzanskis extended the



time of payment to November 1, 1903. No payment on the note was made then and nothing has been paid upon it by the plaintiff since that date.

In connection with the giving of the note of August 15, 1903, and the pledge of the four mortgages as collateral security for its payment assignments of those mortgages in common form were taken by the Wyzanskis, but the defendants do not contend that the assignments so taken gave them other rights in the mortgages than those of pledgees under the terms stated in the note of August 15, 1903.

On December 9, 1903, that note remaining overdue and unpaid the Wyzanskis indorsed it in blank without recourse and delivered it to the defendant McLoud, and also assigned to him the four mortgages. McLoud paid no consideration for the note or the four mortgages and the transfers were made to him simply as the agent or attorney of the Wyzanskis, he having acted in the matter from that time simply as their agent or attorney, and for their benefit alone and under their orders. By their direction he as assignee of the \$28,500 mortgage of January 7, 1901, proceeded to foreclose that mortgage by a sale under the power contained in it, and on January 11, 1904, the land was sold under that power, subject to the three other mortgages and to any and all unpaid taxes and assessments. One of the Wyzanskis was the highest bidder at the foreclosure sale, and upon his bid of \$3,100 the property sold was struck off by his direction to the defendant Gale who was not present and had given no previous authority for the use of her name as purchaser, and who paid no money, but who was a clerk in the employment of the Wyzanskis. No money was paid by any one upon the foreclosure purchase and no payment has been indorsed on the note of August 15, 1903, on account of that sale, and no credit has been given to the plaintiff on account of the proceeds of the sale. A deed of the property sold at the foreclosure was made out to Gale by McLoud, and Gale upon receiving it, on January 12, 1904, gave a mortgage of the same property to McLoud to secure the payment to the Wyzanskis of the sum of \$20,000, and McLoud assigned to them the mortgage given by Gale. She never had any real financial interest in the transaction, and her name was used and she acted in it



so far as she did act simply as a matter of convenience for the Wyzanskis, as also did McLoud. After the foreclosure sale McLoud redelivered to them the note of August 15, 1903, and reassigned to them the three other mortgages. Such record title as Gale has under the foreclosure sale she holds simply as the agent and for the benefit of the Wyzanskis. Since the sale they have been in possession of the real estate and have been in receipt of the rents and profits thereof.

The final decree dismissing the bill with costs recites "that there was a default in the payment of the note; that the plaintiff had proper notice of the foreclosure of the mortgage held as collateral; that the sale under the same was fairly conducted in the presence of the plaintiff; that the property was sold at a fair and reasonable value; that the defendants under the contract made between them and the plaintiff had a right to purchase the property for their own benefit, and that they did so."

These recitals are in the nature of findings of fact. Upon reading the report of the evidence the only one of them about the correctness of which there may be a doubt is whether the property was sold at a fair and reasonable value. As such findings of fact are not to be reversed by this court unless they clearly appear to be erroneous, we treat all the recitals of fact in the decree as correct.

But nevertheless we are of opinion that upon the other facts admitted by the pleadings or clearly established by the evidence, in connection with the facts recited in the decree the plaintiff is entitled to relief.

The plaintiff's right to redeem his pledge of August 15, 1903, has never been taken away from him or rendered unenforceable by any sale of the pledged property under the statute or otherwise for the purpose of devoting the proceeds of the pledged property to the payment of the debt for which it was pledged as collateral.

The transfers of the four mortgages to McLoud as the mere agent or attorney of the Wyzanskis were not a sale under the terms of the pledge, were merely colorable, and had no effect upon the plaintiff's right to redeem from his pledge. So far as the three mortgages which have precedence of that which has been foreclosed are concerned the plaintiff's right to redeem



them from his pledge of August 15, 1903, is unaffected by the foreclosure of the fourth mortgage.

While upon the facts recited in the decree the plaintiff cannot have the foreclosure of the fourth mortgage set aside, that foreclosure does not preclude him from relief in respect to the proceeds of the foreclosure.

When a mortgage of real estate pledged as collateral security for the payment of a note other than the mortgage debt is foreclosed otherwise than by sale under a power, so that the pledgee thereby acquires title to the land absolute as against the mortgagor still the pledgee holds the land as security merely for his debt against the pledgor, and the pledgee's interest in the land is liable to be defeated by the payment of the debt for which the mortgage was pledged. *Brown v. Tyler*, 8 Gray, 135. *Montague v. Boston & Albany Railroad*, 124 Mass. 242, 245. *Stevens v. Dedham Institution for Savings*, 129 Mass. 547, 549.

All these cases were instances in which the act of foreclosure placed the title of the mortgaged land in the pledgee, and they hold that so long as the title remains in him the value of the land is not to be applied as a payment in discharge of the pledge, and that the land is substituted to the lien of the pledge and may be redeemed by the pledgor.

The plaintiff contends that notwithstanding the fact that in the present instance the foreclosure was by sale, because the title to the mortgaged land still is in effect in the Wyzanskis as between them and the plaintiff, the land is merely substituted for the foreclosed mortgage and may be redeemed from the pledge. We think this contention cannot be sustained. If the foreclosure sale had placed the title in a third person as purchaser it is plain that the pledgor no longer would be able to redeem the land, and that the net proceeds of the foreclosure sale would be a sum to be applied as of the date when they accrued in reduction of the debt to secure which the pledge was given. We see no reason to hold otherwise when the pledgee himself is the purchaser at a valid foreclosure sale at which he has under the power a right to buy for himself.

The result is that the net proceeds of the foreclosure sale should be applied as of January 11, 1904, as a partial payment



on the note of August 15, 1903, and the plaintiff should have a day fixed on or before which he may redeem the three mortgages first mentioned in that note from their present holders the Wyzanskis, upon payment to them of the balance of the note of August 15, 1903, treating the interest on that note to October 21, 1903, as extinguished by the payment of October 21, 1903, and reckoning interest at the rate of five per cent per annum until the day of redemption. Upon such payment the Wyzanskis should assign the said three mortgages and the notes and debts thereby secured to the plaintiff. We think neither party ought to have costs.

The decree of the Superior Court is reversed and the cause remanded to that court for further proceedings in accordance with this opinion.

*So ordered.*

*H. P. Harriman & J. F. Neal*, for the plaintiff.

*H. G. Allen*, for the defendants.

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ANNIE HYDE, administratrix, *vs.* EDWARD S. BOOTH.

Suffolk. January 19, 1905. — May 22, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, Employer's liability. Ship.*

A stevedore is not liable to the widow and administratrix of a longshoreman employed by him in unloading a vessel for the death and suffering of the plaintiff's husband and intestate caused by his falling into the hold of the vessel from stepping on a defective section of one of the hatches put in place by the intestate and a fellow workman.

The hatches of a vessel are not part of the ways, works or machinery of a stevedore engaged in unloading it.

A stevedore unloading a vessel is not liable at common law for injuries to one of his workmen caused by a defect in the covering of a hatchway of the vessel.

TORT at common law and under R. L. c. 106 by the administratrix of the estate of Lawrence Hyde, a longshoreman, being also his widow, against a stevedore employing him, for causing



the death and conscious suffering of the plaintiff's intestate, with three counts described in the opinion. Writ dated February 1, 1901.

In the Superior Court *Fox, J.* ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*W. B. Grant*, for the plaintiff.

*J. Lowell & J. A. Lowell*, for the defendant.

LATHROP, J. An examination of the bill of exceptions discloses no cause of action against the defendant, and the order of the judge of the Superior Court directing a verdict for the defendant was right.

The evidence shows that the plaintiff's intestate was a long-shoreman in the employ of the defendant, a stevedore; and that the accident happened through a section of one of the hatches of a vessel in which he was working being too short. If the section was placed in position in a certain way, it would not bear any weight upon it. The intestate and one of his fellow workmen placed it in position, the intestate then stepped upon it, was precipitated into the hold, and died after a few moments of conscious suffering.

The first count is under the R. L. c. 106, § 71, cl. 2, and alleges the negligence of a superintendent. There is no evidence to support this count.

The second count is under § 72 of the same chapter, and the negligence alleged under § 71, cl. 1, is a defect in the ways, works or machinery; and this is the count chiefly relied upon. This count was improperly joined with the others. *Brennan v. Standard Oil Co.* 187 Mass. 376. But as this point was not raised at the trial we proceed to consider the case. The hatch in question belonged to the vessel, and was not under the control of the defendant. It was no part of the defendant's ways, works or machinery. *Trask v. Old Colony Railroad*, 156 Mass. 298. *Regan v. Donovan*, 159 Mass. 1. *Engel v. New York, Providence, & Boston Railroad*, 160 Mass. 260. *Hughes v. Malden & Melrose Gas Light Co.* 168 Mass. 895. *Moynihan v. King's Windsor Cement Co.* 168 Mass. 450, 452. *Riley v. Tucker*, 179 Mass. 190. *Kirk v. Sturdy*, 187 Mass. 87.

The third count is at common law and alleges failure to furnish proper machinery and a safe place to work. The plaintiff can-



not recover under this count for the defendant did not furnish the machinery, and had no control over the place where the plaintiff's intestate was at work. *Regan v. Donovan, Moynihan v. King's Windsor Cement Co.* and *Hughes v. Malden & Melrose Gas Light Co., supra.*

*Exceptions overruled.*

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PEARL I. CUMMINGS vs. JOHN L. AYER.

Middlesex. January 27, 1905. — May 22, 1905.

Present: KNOWLTON, C. J., MORTON, LORING, & BRALEY, JJ.

*Practice, Civil. Landlord and Tenant.*

Under R. L. c. 178, § 96, a plaintiff is not required to take an appeal within thirty days after the entry of an interlocutory judgment sustaining a demurrer to his declaration, but may wait until final judgment is ordered for the defendant before taking his appeal.

A landlord owes no duty to his tenant or a member of the tenant's household to make repairs unless he has agreed to do so, and where he has made such an agreement he is not liable for a want of repair of which he has received no notice.

TORT for personal injuries as alleged below. Writ dated June 2, 1902.

The declaration was as follows: "And the plaintiff says that on the first day of October, 1901, Charles E. Cummings, the father of the plaintiff, who is a minor three years of age and a member of the family of the said Charles E. Cummings, hired of the defendant a certain tenement, number 8 Martin Street in Medford, and the said Charles E. Cummings entered into possession of said tenement and used the same as a dwelling-house for himself and his family, including the plaintiff; that the said defendant agreed to keep the said tenement in repair and make the same fit for use and habitation; that the defendant has failed to perform his agreement to keep the premises in repair but has allowed the kitchen floor to become loose, rough and uneven, whereby the plaintiff while walking and using the same and in the exercise of due care, part of the wooden floor of said kitchen



separated and parted and entered the knee of the plaintiff, whereby she became sick, sore and lame, to her damages."

The defendant demurred, and also filed an answer not waiving his demurrer. Later by leave of court he amended his demurrer. On April 4, 1904, the Superior Court sustained the demurrer. On June 29, 1904, the defendant moved that judgment be entered in his favor. On July 7, 1904, the motion was allowed, and it was ordered that judgment be entered for the defendant with costs. The plaintiff appealed. The defendant contended that under R. L. c. 173, § 96, the appeal should have been taken within thirty days after the entry of the interlocutory judgment sustaining the demurrer. He also contended that the demurrer was sustained rightly. The plaintiff contended that the declaration set forth a cause of action.

*M. F. Farrell*, for the plaintiff, submitted a brief.

*A. S. Hall*, for the defendant.

**BRALEY, J.** The order sustaining the demurrer was not accompanied by any direction that judgment thereon should be entered for the defendant, and until this had been done the plaintiff's right of appeal to this court was in abeyance. R. L. c. 173, § 96. *Fay v. Upton*, 153 Mass. 6.

Under the practice adopted in this case by the Superior Court, after the demurrer was sustained an opportunity was afforded the plaintiff to amend her declaration if she desired, while the defendant was at liberty to move for judgment if an amendment was not seasonably filed or allowed, and no injustice was suffered by either party by the course pursued.

While the question of law raised by the demurrer is before us properly, the plaintiff's appeal cannot be sustained. The declaration fails to allege the violation of any agreement made between the parties themselves to keep the demised premises in tenantable repair. *Bowe v. Hunking*, 135 Mass. 380, 383. *Cowen v. Sunderland*, 145 Mass. 363, 364. It also fails to show that if the defendant ever entered into any enforceable contract with the plaintiff's father to make such repairs and has broken the agreement, that there has been a breach of any duty owed to the plaintiff.

If the allegations made are treated as setting out an executory contract to that effect, and its breach, the mere want of repair



of the floor and nothing more is not sufficient. *Tuttle v. Gilbert Manuf. Co.* 145 Mass. 169, 175. In order to hold the defendant liable it must appear by proper averments that notice was given to him of its condition or that he knew of it and neglected to make the necessary repairs, or that he agreed to repair without notice, which also is not averred. *Hutchinson v. Cummings*, 156 Mass. 329. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472, 474. *Marley v. Wheelwright*, 172 Mass. 580, 583.

No neglect of any duty owed by the defendant to the plaintiff's father under the contract therefore is alleged, from which a cause of action owing to the defendant's negligence would have arisen in his favor. The plaintiff as a member of his household has no broader right. *Moynihan v. Allyn*, 162 Mass. 270.

*Judgment affirmed.*



JOHN DANIEL vs. CLARENCE E. LEARNED & another.

Suffolk. March 10, 1905. — May 22, 1905.

Present: KNOWLTON, C. J., LATHEOP, BARKER, HAMMOND, & BRALEY, JJ.

*Contract, Rescission. Bills and Notes. Damages.*

If a note payable in two months is accepted in settlement of an account payable immediately, it is too late when the note falls due at the expiration of the two months for the maker of the note after enjoying the advantage of the delay to attempt to rescind it on the ground that the payee had misrepresented the amount of the balance due on the account. If misrepresentations were made by the payee, the maker when sued on the note can show in reduction of damages the true amount due on the account.

CONTRACT on a promissory note for \$3,486.89 dated July 31, 1903, and payable two months after date. Writ dated October 3, 1903.

The defences set up were want of consideration and misrepresentation as to the amount to be paid by the note as stated in the opinion. In the Superior Court the case was tried before *Schofield*, J. who refused to give the instructions requested by the defendants, and left the case to the jury in the manner stated in the opinion.



The jury returned a verdict for the plaintiff in the sum of \$3,626.55; and the defendants alleged exceptions.

*C. R. Darling*, for the defendants.

*H. G. Allen*, for the plaintiff.

HAMMOND, J. This is an action upon a promissory note brought by the payee against the makers, to which the material defences are want of consideration, and misrepresentation as to the amount of the balance due to the plaintiff in settlement of which the note was given.

It appears that the plaintiff made a contract with the defendants for the removal of a certain building, by the terms of which the plaintiff was to furnish all the necessary labor and materials and was to receive the amount of his actual expenses therefor, together with a sum to be agreed upon (afterwards fixed at \$1,200) for his profit or compensation. During the progress of the work, various payments on account were made by the defendants. After the completion of the work the plaintiff presented to the defendants his account, representing the same to be true, "except that there might be some other bills which had not yet come in." The defendants not being prepared to pay in cash the balance appearing to be due to the plaintiff, at his request gave in payment therefor the note in suit. It does not appear that the defendants ever asked to see the plaintiff's vouchers, and the evidence tended to show that they never did see them, but, in giving the note, relied upon the plaintiff's representation that the account was correct. There was some evidence tending to show comparatively small errors in some of the items, so that the balance due to the plaintiff, as shown by him, appeared to be about \$100 more than it actually was; and the defendants contended that this was known by the plaintiff when he presented his account. There was no evidence that the defendants ever attempted to rescind the "agreement of settlement" on the ground of fraudulent representation, or gave notice of such rescission to the plaintiff. "The only use made of the alleged fraud was by plea in this action."

At the trial it was not denied that there was a balance of several thousand dollars due to the plaintiff, but it was contended by the defendants that the note was obtained by the misrepresentation by the plaintiff as to the balance due, and was there-



fore voidable by them; and they asked the judge in substance to rule that if, on presentation of his account, the plaintiff represented it to be correct, or correct as far as it went, and the defendants relying upon the representation gave the note, the plaintiff was not entitled to recover if the account was not correct and the plaintiff, when he rendered it, knew that fact. The judge refused to rule as requested and submitted the case to the jury, under instructions which authorized them to find for the plaintiff for the sum justly due to him on the account, even if the plaintiff knowingly presented an incorrect account and represented it to be correct and the note was given in reliance upon that representation.

It is well settled in this Commonwealth that where a note is given for goods sold under such circumstances as give the buyer the right to rescind the contract, if the buyer rescinds, the note is avoided as between him and the seller; but if the buyer does not rescind, and allows the contract to stand, the seller can recover upon the note subject to the right of the buyer to reduce the amount as though the action were brought on the contract of sale. And this rule is applicable whether the right to rescind is based upon the fraudulent conduct of the seller or otherwise. In other words, the buyer may rescind or not. If he rescinds, the note in the hands of the seller is avoided. If he does not rescind, but avails himself of the contract, then the seller may recover upon the note subject to a deduction which ought to be made from the plaintiff's demand, as though the action were upon the contract of sale. *Harrington v. Stratton*, 22 Pick. 510. *Perley v. Balch*, 23 Pick. 283, 286.

The defendants in their brief seem to concede this general rule as to notes given for goods sold, but argue that the rule is not applicable to a case like this, where there is nothing to return; that the defendants received nothing, and therefore there was nothing to return.

When the parties met to settle the accounts, the plaintiff was entitled to receive the balance due him, and to receive it at once in money, and if not paid he had the right to sue at once to recover it. The note was given in payment of the balance due. The note was not payable until the expiration of two months. By taking it the plaintiff had lost his right of action upon the



account and had gained a right of action only on the note. He had lost his right to sue immediately if not paid, and had entered into an obligation to wait two months for his pay. The defendants, who were unable to pay, were discharged from their liability on the account, and the time in which they could be compelled to pay was postponed two months.

If it be assumed that they had the right to rescind the settlement and avoid the note for fraud, the case shows that they did not do it or offer to do it. They availed themselves of the benefit conferred upon them by the contract, namely, two months' immunity from liability to a suit, and having got the benefit of this delay, they attempt to avoid the note and remit the plaintiff to his original right to sue on the account.

The same principles out of which spring the rules above mentioned with reference to a note given to a fraudulent seller by a defrauded buyer are applicable to the state of things found here, and should be applied. By applying them justice is worked out and no principle of law is violated. In *Haycock v. Rand*, 5 Cush. 26, a somewhat similar state of things arose, but the point on which the case finally was decided differed from the one decided here.

*Exceptions overruled.*

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FANNY E. CLARK vs. SAMUEL D. JENNESS.

Suffolk. March 14, 1905. — May 22, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Contract, Implied: common counts.*

In an action for \$75 had and received to the plaintiff's use, it appeared that the defendant agreed to pay that sum in settlement of an action and claim for rent by a third person against the plaintiff, whereupon the plaintiff gave the defendant \$25 in cash and surrendered to him two receipts representing \$50 which the plaintiff previously had paid to the defendant upon a mortgage debt, the defendant agreeing to pay the \$50 previously received from the plaintiff in settlement of the action against the plaintiff instead of applying it in reduction of the mortgage debt, and that the defendant paid nothing in settlement of the action and claim against the plaintiff. *Held*, that the plaintiff could recover the sum of \$75 in this action.



CONTRACT for \$75 had and received to the plaintiff's use, with a second count setting out the facts relied upon to maintain the action. Writ in the Municipal Court of the City of Boston dated April 22, 1903.

On appeal to the Superior Court the case was tried before *Aiken, J.* At the close of the evidence the defendant requested the judge to rule that upon all the evidence the plaintiff could not recover, and further to rule that, with reference to the alleged payment of \$50 by the plaintiff to the defendant, the delivery by the plaintiff to the defendant of receipts for amounts previously paid by the plaintiff to the defendant on account of a mortgage held by the defendant did not constitute a payment of money for which recovery could be had in this action; and that the payment of \$25 in the manner testified to by the plaintiff gave no right of action therefor against the defendant.

The judge refused to rule as requested, and ruled in substance that if the payment of the \$25 was made by the plaintiff to the defendant to be paid to one Clapp, mentioned in the opinion, to pay the rent for the week ending March 1, 1901, and was not paid to Clapp but was retained by the defendant, the plaintiff could recover the amount from the defendant in this action, and with reference to the payment of \$50 by delivery of the receipts mentioned above, gave the instruction quoted in the opinion.

The jury returned a verdict for the plaintiff in the sum of \$82.88; and the defendant alleged exceptions.

*A. W. Eldredge*, (*W. Keyes* with him,) for the defendant.

*G. H. Russ*, for the plaintiff, was not called upon.

KNOWLTON, C. J. One Clapp, who was the owner of premises occupied by the plaintiff as tenant, brought an action against her and attached her furniture to recover arrears of rent. The defendant told her that he had seen Clapp and could settle the suit for \$50, but that Clapp also insisted upon the rent, amounting to \$25, for the week ending about March 1, 1901, after which time he, the defendant, had arranged to hire the house of Clapp, and the plaintiff could thereafter pay rent to him at \$25 per week, as his tenant. The plaintiff said that this arrangement would be satisfactory, and she thereupon paid him \$25 in cash, and gave back to him two receipts to the amount of \$50 for money which she previously had paid him on a mortgage



debt which he held against her, it being agreed that these receipts should be treated as money, and that the money previously paid should not be applied as originally intended in reduction of the mortgage. The evidence tended to show that the defendant did not pay Clapp any money, nor settle the action which he had against the plaintiff, nor make any attempt to settle it.

The judge rightly refused the defendant's requests for rulings, and properly submitted the case to the jury. He instructed them that "If the parties agreed to treat the surrender of the receipts as a money transaction and consider it a payment of money, the plaintiff could recover the fifty dollars in this action." This was in accordance with the authorities. *Randall v. Rich*, 11 Mass. 494. *Arms v. Ashley*, 4 Pick. 71. *Emerson v. Baylies*, 19 Pick. 55. *Perry v. Swasey*, 12 Cush. 36.

The evidence well warranted a finding that there was \$25 due to Clapp for rent for the week ending March 1, 1901. If the defendant received this sum to be paid to Clapp for this rent and did not pay it, he is liable for it in an action for money had and received. The jury might have disbelieved the defendant's testimony that he hired the premises from Clapp on or about February 22, 1901, and even if it were true, it would not necessarily be a defence to this action.

*Exceptions overruled.*

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HARRIET S. DAVIS & others vs. NATIONAL LIFE INSURANCE COMPANY.

Suffolk. March 27, 1905. — May 24, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & HAMMOND, JJ.

*Interest. Practice, Civil.*

Where an amount of money recovered in an action at law was due before the writ was issued, the plaintiff is entitled to interest from the date of the writ unless something appears to take the case out of the general rule.

Where, on a question in regard to the allowance of interest, it appears that the case was heard in the Superior Court upon an agreed statement of facts, with a stipulation that inferences might be drawn from certain testimony bearing upon



an alleged agreement in regard to interest, and the Superior Court has given judgment for an amount which includes interest, it will be assumed that the finding upon the testimony as to the agreement was in favor of the plaintiff, and if there is evidence to warrant the finding it will not be disturbed.

The facts, that after the bringing of an action at law to recover the amount due on a life insurance policy a suit in equity was begun in a court of the United States by other claimants of the insurance money in which the plaintiffs and the defendant were made parties, and the action at law was continued for a long time until the suit in equity was disposed of by a dismissal of the bill, afford no ground for refusing the plaintiff interest during the entire period from the date of his writ, if there was no injunction or order in the proceedings in the United States court to restrain the defendant from paying the debt according to its terms, and nothing to prevent the defendant from filing a petition of interpleader under St. 1896, c. 281, (R. L. c. 173, § 87,) admitting its liability, or from paying the money into court at any time it pleased.

KNOWLTON, C. J. The only question in this case is whether the plaintiffs are entitled to interest from the date of the writ upon the amount due under a policy of life insurance payable to them as beneficiaries. As this amount was due before the writ was issued, interest must be computed from the bringing of the action, unless something appears that takes the case out of the general rule. *Pierce v. Charter Oak Ins. Co.* 138 Mass. 151, 164. The hearing in the Superior Court was upon a statement of agreed facts, with a stipulation that inferences might be drawn from certain testimony bearing upon an alleged agreement in regard to interest. The judgment of the Superior Court being for an amount which includes interest, it must be assumed that the finding upon this testimony was in favor of the plaintiffs, and, as there was evidence to warrant the finding, it cannot be set aside on an appeal.

The only other matter relied on by the defendant is that there were other claimants for this money who brought a suit in equity in the Circuit Court of the United States, in which these plaintiffs and the defendant were made parties, and that the present action was continued for a long time, until the suit in equity was disposed of by a decree of dismissal.

There was nothing in any of the judicial proceedings which restrained the defendant from paying the debt according to its terms. No injunction was issued and no stipulation was made as a substitute for an injunction. Before the commencement of the present action the defendant had notice of the adverse claims of the contending parties, and from August 23, 1897, the



date of the writ, to September 25, 1897, the time of bringing the bill in equity, it might have filed its petition under the St. 1886, c. 281 (R. L. c. 173, § 37), and have relieved itself from liability for interest. At any time afterward it might have paid the money into court if it had thought it best to do so. The agreed facts indicate that it has used the money and received income from it during all the time that the case has been pending. See *Norris v. Massachusetts Ins. Co.* 131 Mass. 294, 296.

We find nothing in the record that required the judge of the Superior Court to exclude from the amount of the judgment the usual allowance of interest from the date of the writ.

*Judgment affirmed.*

*A. E. Denison & W. S. Campbell*, for the defendant.

*F. H. Williams & F. M. Copeland*, for the plaintiffs.

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TIMOTHY MOYNIHAN vs. FRANK P. TODD.

ABBIE M. MOYNIHAN vs. SAME.

MATTHEW H. TOOMEY vs. SAME.

Essex. March 8, 1904. — May 25, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Municipal Corporations. Superintendent of Streets. Negligence.*

Discussion by KNOWLTON, C. J. of the liability of officers and agencies of government for negligence in the performance of public duties.

A municipal officer is not exempt from liability for acts of personal misfeasance in the performance of a public duty.

If the superintendent of streets of a town is personally negligent in superintending the blasting of a rock in a highway, he is liable to one who in the exercise of due care is injured from being struck by pieces of the rock.

THREE ACTIONS OF TORT against the superintendent of streets of the town of Rowley for personal injuries received in the manner stated in the opinion. Writs dated January 8 and 9, 1902.

In the Superior Court the cases were tried together before *Mason*, C. J., who ordered verdicts for the defendant. The plaintiffs alleged exceptions.



The cases were argued at the bar in March, 1904, before *Knowlton, C. J., Morton, Hammond, Loring, & Braley, JJ.*, and afterwards were submitted on briefs to all the justices.

*H. I. Bartlett, (R. E. Burke with him,)* for the plaintiffs.

*G. B. Blodgett, (H. P. Moulton with him,)* for the defendant.

KNOWLTON, C. J. These three actions are founded upon the alleged negligence of the defendant in carelessly blasting a rock in a highway, whereby the plaintiffs Toomey and Abbie M. Moynihan were struck by pieces of rock and injured, and the plaintiff Timothy Moynihan, husband of Abbie, was put to expense on account of his wife's injury. It was admitted that the injured plaintiffs were in the exercise of due care.

The defendant was the superintendent of streets for the town of Rowley, and at the time of the accident he was repairing a street, with others working under his direction and subject to his control. He directed that a boulder be removed by blasting, and just before the explosion he went away a short distance from it, to be beyond the reach of the broken rock that might be thrown out by the blast. The evidence would have warranted a finding that, if there was negligence in blasting the rock, he was legally responsible for the consequences of it, unless he was relieved from liability by the fact that he was acting as a public officer. The jury might have found that he was personally negligent, and it is plain from the testimony that he had the management and control of the repairs then in progress on the highway, and that the men who were employed by him on the different parts of the work acted under his direction. *Elder v. Bemis*, 2 Met. 599, 605. *Bickford v. Richards*, 154 Mass. 163. *Delory v. Blodgett*, 185 Mass. 126, and cases cited. We come now to the question whether he was exempted from liability by the rules of law applicable to public officers.

Under the statute which authorizes the appointment of a superintendent of streets in a town, he was to "have the same powers and be subject to the same duties, liabilities and penalties which have been imposed upon surveyors of highways and road commissioners." Sts. 1889, c. 98; 1893, c. 423, §§ 25, 26; 1894, c. 17. R. L. c. 25, §§ 85, 86. These statutes, however, do not make this officer liable to a fine for non-acceptance of his appointment to office by the selectmen, as highway sur-



veyors and some other town officers are for a neglect to take the oath of office after an election in town meeting. See R. L. c. 25, § 97. Although the language of some of the decisions suggests a distinction between the performance of public duties voluntarily undertaken and the performance of them under the compulsion of a statute, we shall assume in favor of the defendant, for the purposes of this decision, that the difference is immaterial, and shall treat the defendant as if he were a highway surveyor. See *Nowell v. Wright*, 3 Allen, 166; *Tindley v. Salem*, 137 Mass. 171, 175. A highway surveyor is not liable to an action at common law in Massachusetts for negligently omitting to perform the duties of his office, or for performing them in such a negligent manner as to fail to give the public the benefits which they ought to receive in the enjoyment of good roads. His only liability for this kind of negligence is statutory. R. L. c. 25, § 82. *Callender v. Marsh*, 1 Pick. 418. *Elder v. Bemis*, 2 Met. 599. *Benjamin v. Wheeler*, 15 Gray, 486. *White v. Phillipston*, 10 Met. 108. *Bartlett v. Crozier*, 17 Johns. 439.

The principal ground on which public officers find exemption from liability for negligence in the performance of their official duties in certain cases, is the same as that which relieves cities and towns and other agencies of the government from a liability to individuals for a failure to perform similar duties. Unless under some special statutory provision, a public officer can have no greater exemption from such a liability than is granted to a city or town which neglects to perform the public duties imposed upon it. *Hill v. Boston*, 122 Mass. 844, 861.

The subject of the liability of officers and agencies of government for negligence in the performance of public duties, was considered at great length in *Hill v. Boston*, 122 Mass. 844, with an elaborate review of the cases, both English and American. The rule adopted in that case is the same as previously had existed in England, and was understood to be then in force there. Following this rule, it always has been held in the American courts that an agency of government or a public officer, while performing a duty imposed solely for the benefit of the public, is not liable for a mere failure to do that which is required by the statute. Negligence that is nothing more than an omission or non-feasance creates no liability. *Russell v. Men*



of *Devon*, 2 T. R. 667. *Young v. Davis*, 7 H. & N. 760. *Cowley v. Newmarket Local Board*, [1892] A. C. 845. *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433. *Tindley v. Salem*, 137 Mass. 171. *Mahoney v. Boston*, 171 Mass. 427. *Sampson v. Boston*, 161 Mass. 288. *Maxmilian v. Mayor of New York*, 62 N. Y. 160. *Eastman v. Meredith*, 36 N. H. 284. *Brown v. Vinalhaven*, 65 Maine, 402. *Colwell v. Waterbury*, 74 Conn. 568. *Condict v. Mayor of Jersey City*, 17 Vroom, 157. *Nicholson v. Detroit*, 129 Mich. 246. *Kuehn v. Milwaukee*, 92 Wis. 263. *Ogg v. Lansing*, 35 Iowa, 495. *Bryant v. St. Paul*, 33 Minn. 289. *Summers v. Commissioners of Daviess County*, 103 Ind. 262. *Love v. Atlanta*, 95 Ga. 129. *Sievers v. San Francisco*, 115 Cal. 648. *Galveston v. Posnainsky*, 62 Tex. 118, 129, 181. *Conelly v. Nashville*, 100 Tenn. 262. Prior to the decisions in *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, and *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214, which overruled the case of *Holliday v. St. Leonard's*, 11 C. B. (N. S.) 192, it was held in England that for negligent acts of misfeasance by the servants or agents of a municipality or a public officer performing duties strictly public, there was no liability upon the employer, on the ground that the doctrine *respondet superior* does not apply to the servants of one who is acting only as a representative of the government, for the benefit of the public. *Holliday v. St. Leonard's*, *ubi supra*. *Duncan v. Findlater*, 6 Cl. & F. 894, 908. *Hall v. Smith*, 2 Bing. 156, 159. This is the rule generally in the American courts. *Sampson v. Boston*, 161 Mass. 288. *Curran v. Boston*, 151 Mass. 505. *Mahoney v. Boston*, 171 Mass. 427. *Kelley v. Boston*, 186 Mass. 165. See also cases above cited. But now the law in England seems to hold agencies of the government liable for injuries from acts of misfeasance committed by servants or agents engaged in a public work. See *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214.

In this Commonwealth, in the course of years, the application of the law in regard to the liability of municipalities and public officers for negligence has produced a variety of statements, and perhaps some conflict of decision. While we never have adopted the present English rule establishing a general liability of the master for the misfeasance of his servants in this class of cases, and sometimes have stated rather broadly a general exemption



from liability for negligence while performing public work, it repeatedly has been intimated that a liability for individual and personal acts of misfeasance exists in these cases as well as others. This was expressly stated in *Howard v. Worcester*, 153 Mass. 426, 428, and the reasons given for the decision in *McKenna v. Kimball*, 145 Mass. 555, lead to a similar result. In *Walcott v. Swampscott*, 1 Allen, 101, *Barney v. Lowell*, 98 Mass. 570, and *Fisher v. Boston*, 104 Mass. 87, which were suits against the town and the cities for work done by a public officer, it was held that the doctrine *respondet superior* does not apply. In *Butterfield v. Boston*, 148 Mass. 544, 546, the injury was caused by a negligent act of a gateman or a draw tender, and Chief Justice Morton, in the opinion of the court, which held that an action could not be maintained against the city, said that these persons might be liable individually. In *Nowell v. Wright*, 8 Allen, 166, the action was against the tender of a drawbridge, an officer appointed by the Governor of the Commonwealth much as superintendents of streets are appointed by the selectmen of towns; and the injury having been caused by his personal negligence in a positive act, which thus became a misfeasance, he was held liable. See also *Young v. Davis*, 7 H. & N. 760, 771; *Foreman v. Mayor of Canterbury*, L. R. 6 Q. B. 214; *Duncan v. Findlater*, 6 Cl. & F. 894, 903; *Municipality of Pictou v. Geldert*, [1893] A. C. 524, 531; *O'Leary v. Board of Fire Commissioners*, 79 Mich. 281, 286; *Nicholson v. Detroit*, 129 Mich. 246, 258. We are of opinion that the principle which underlies the rule that public officers and other agencies of government are not liable for negligence in the performance of public duties goes no further than to relieve them from liability for non-feasance, and for the misfeasances of their servants or agents. For a personal act of misfeasance, we are of opinion that a party should be held liable to one injured by it, as well when in the performance of a public duty as when otherwise engaged. We think that the general course of decision in this Commonwealth is not in conflict with this view. But for acts of misfeasance of a servant or agent in such cases, there is no liability. This is because the rule *respondet superior* does not apply.

There is an exception to the last branch of the rule. Whenever the work is not entirely public, but is in part for profit, or



when any element of pecuniary advantage enters into it, there is a liability for the negligent acts of servants. On this ground it was long ago held that a city or town might be liable for negligent acts of misfeasance done by its servants in the construction or repair of a common sewer. *Coan v. Marlborough*, 164 Mass. 206, 208. *Tindley v. Salem*, 137 Mass. 171. *Lynch v. Springfield*, 174 Mass. 430. *Norton v. New Bedford*, 166 Mass. 48. *Child v. Boston*, 4 Allen, 41. *Allen v. Boston*, 159 Mass. 324. *Curran v. Boston*, 151 Mass. 505, 508. Another and different class of cases in which there is a liability for the misfeasance of servants or agents is referred to by Chief Justice Gray in *Hill v. Boston*, 122 Mass. 344, 358, as follows: "If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river, or a natural watercourse, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts. *Anthony v. Adams*, 1 Met. 284, 285. *Lawrence v. Fairhaven*, 5 Gray, 110. *Perry v. Worcester*, 6 Gray, 544. *Parker v. Lowell*, 11 Gray, 353. *Wheeler v. Worcester*, 10 Allen, 591. So if a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another to his injury, it is liable to him in an action of tort. *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223. *Hildreth v. Lowell*, 11 Gray, 345. *Haskell v. New Bedford*, 108 Mass. 208. But in such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside of the limits of the public work." This doctrine was reaffirmed in *Tindley v. Salem*, *ubi supra*, and it has been applied in many cases. Its exact limits have not been very clearly defined. Perhaps it includes *Elder v. Bemis*, 2 Met. 599, and *Hawks v. Charlemont*, 107 Mass. 414, in which the reasons for the decisions were not very plainly stated, but in each of which the negligent act was a trespass causing a direct injury to the plaintiff's property outside of the limits of the highway. See also *Miles v. Worcester*, 154 Mass. 511; *Edgerly v. Concord*, 62 N. H. 8, 19; *Eastman v. Meredith*, 36 N. H. 284, 296; *Colwell v. Waterbury*,



74 Conn. 568, 573; *Mayor of New York v. Bailey*, 2 Denio, 438.

The result is that if the jury in the present case find that the defendant was personally negligent in causing the rock to be blasted without taking proper precaution for the safety of persons rightfully in the vicinity, a verdict should be rendered against him; but if there was no negligence in blasting the rock, or if the only negligence was that of the defendant's servants or agents, he is not liable.

*Exceptions sustained.*

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### ISRAEL ROME vs. CITY OF WORCESTER.

Worcester. October 6, 1904. — May 27, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, & BRALEY, JJ.

#### *Municipal Corporations. Worcester.*

The city of Worcester is not liable for the negligence of its servants or agents in performing the public duties imposed on that city by St. 1886, c. 331, establishing a system of sewage disposal in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone River. Following *Harrington v. Worcester*, 186 Mass. 594.

TORT, for injury to a brick building of the plaintiff on Water Street in Worcester from the alleged negligent blasting of rock by the defendant in the construction of a sewer under St. 1886, c. 331. Writ dated February 23, 1901.

At the trial in the Superior Court before *Gaskill, J.* the plaintiff offered to show that the method adopted of blasting with heavy charges in solid rock was not necessary to the performance of the work and was excessive and unreasonable. The judge excluded the evidence and ordered a verdict for the defendant. The plaintiff alleged exceptions.

*R. Hoar & S. G. Friedman*, for the plaintiff.

*A. P. Rugg & J. F. Humes*, for the defendant.

KNOWLTON, C. J. The alleged negligence of which the plaintiff complains was in the performance of the public duties imposed upon the city of Worcester by the St. 1886, c. 331.



This statute was considered in *Harrington v. Worcester*, 186 Mass. 594, and was held to be unlike the ordinary statutes for the construction and maintenance of sewers, under which there is a liability on the part of cities and towns for negligence, and like other statutes which impose upon cities and towns the performance of duties strictly public. The city, having constructed and maintained a sewer in accordance with the statute, was held to be under no legal liability for such pollution of the water of the Blackstone River as it necessarily caused, and this later statute was said to be "a measure in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone River." It was said that the duty to make this provision for the public health "was imposed as other public duties which rest upon cities and towns are imposed, like the duty to provide for the education of children, or the duty to establish and maintain the ordinary institutions of the government." A city or town charged with the performance of such public duties, is not liable for any omission or non-feasance or for the misfeasan-  
ances of its servants or agents in the performance of them. *Moynihan v. Todd*, ante, 301, and cases there cited. As the only offer of evidence was to show the negligence of the defendant's servants or agents, the testimony was rightly excluded.

*Exceptions overruled.*

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### COMMONWEALTH vs. JUDEL FRIEDMAN.

Suffolk. January 10, 1905. — June 2, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Practice, Criminal, Venue. Larceny.*

On an indictment for larceny by false pretences under R. L. c. 208, § 28, the defendant under R. L. c. 218, § 47, can be prosecuted only in a county in which he has had possession of the property alleged to have been stolen.

INDICTMENT, found and returned on September 12, 1903, in the Superior Court for the county of Suffolk, charging the



defendant with stealing thirty-five barrels of flour at Boston on February 6, 1903, with subsequent specifications alleging that the defendant obtained the flour by false and fraudulent pretences for use in his bakery at Fall River.

The defendant was tried in the Superior Court for the county of Suffolk before *Harris, J.* The jury returned a verdict of guilty; and the defendant alleged exceptions. The second ruling requested by the defendant, his exception to the refusal of which is sustained by the court, is stated in the last paragraph of the opinion. The other exceptions are made immaterial by the decision of the court.

*A. S. Phillips & W. E. Fuller, Jr.*, for the defendant.

*F. H. Chase*, Second Assistant District Attorney, for the Commonwealth.

*LATHROP, J.* The indictment in each of the two counts charges the offence of larceny under the R. L. c. 208, § 26, and not the distinct offence described in § 61 of the same chapter. Under § 26 the offence may be proved by showing a false pretence, as well as in the other ways specified. Section 61, as amended by the St. of 1902, c. 544, § 29, describes a specific offence, which is the obtaining of goods and chattels "by a false pretence of carrying on business and dealing in the ordinary course of trade."

The only question which we need consider relates to the question of venue. It appears that the flour in question was shipped from the West to Fall River, in Bristol County, and was there received by the defendant. It never was in Suffolk County. It is provided by the R. L. c. 218, § 47: "Larceny, whether at common law or as defined by section twenty-six of chapter two hundred and eight, may be prosecuted and punished in any county in which the defendant had possession of the property which is alleged to have been stolen." The language here is plain, and clearly points out the place where an offence either at common law or under the R. L. c. 208, § 26, is to be punished. The government relies upon the broad language of the R. L. c. 218, § 48. But this applies only to the old form of an indictment for obtaining goods by false pretences, and to the offence described in the R. L. c. 208, § 28, neither of which applies in the present case.



The second request of the defendant, which was in effect that the defendant could not be punished in Suffolk County if Bristol County was the place where the goods actually came into the possession of the defendant, therefore should have been granted.

*Exceptions sustained.*

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MARY TORPHY vs. CITY OF FALL RIVER.

Bristol. October 25, 1904. — June 9, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Way, Defect in highway.*

To carry out the report of the commissioners appointed under St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, the city council of that city authorized the mayor to designate in writing the streets to be closed temporarily and the length of time and the conditions under which they should remain closed. Acting under this order the mayor authorized the railroad company which was required by the commissioners to perform the work, to close a part of a certain street while it was being wrought to a new and lower grade. *Held*, that this did not relieve the city while the work of construction was going on from its obligation either to keep the street in reasonable repair for the use of travellers, or to give notice to the public by signs or barriers that it was closed.

In an action against a city for injuries from an alleged defect in a highway, if it appears, that a railroad company had been making a change of grade in the street under an order of commissioners appointed under a grade crossing act, that the mayor under authority from the city council had designated the street as one to be closed temporarily during the work of construction, that barriers with suitable signs were erected by the railroad company and subsequently were removed, leaving unguarded an open trench which had been dug for the purpose of lowering a water main, and that the plaintiff fell into the trench and was injured, there is evidence of a defect in the highway and of notice of the defect to the defendant.

In an action against a city for injuries from an alleged defect in a highway, if it appears that the plaintiff was passing at night through an unlighted street in which she knew that the work of lowering the grade of the street to carry it under the track of a railroad had been going on for some time, but that "it was finished for people to walk on it," and that the plaintiff was injured by falling into an open trench from which barriers had been removed, there is evidence for the jury that the plaintiff was in the exercise of due care.

TORT, by a woman about fifty years of age, living on Ballard Street in Fall River, for injuries from falling into an unguarded



trench in that highway, when returning to her house at about a quarter past eight o'clock on the evening of November 10, 1902. Writ dated November 26, 1902.

At the trial in the Superior Court *Schofield*, J. refused to order a verdict for the defendant or to make certain rulings requested by the defendant. He submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1,200. The defendant alleged exceptions, raising the questions stated in the opinion.

*H. A. Dubuque*, for the defendant.

*J. W. Cummings*, (*C. R. Cummings* with him,) for the plaintiff.

**BRALEY, J.** In the separation of grades under the provisions of St. 1900, c. 472, to carry out the report of the commissioners, it became necessary during the progress of the work temporarily to close certain of the public ways of the city. For this purpose a general order had been passed by the city council authorizing the mayor to designate in writing these streets, and to fix the length of time, and the conditions under which they should remain closed. Acting under this order, he authorized the railroad company, which was required to perform the work, to close a part of Ballard Street in which the plaintiff lived, while it was being wrought to a new and lower grade that had been established.

The defendant takes the position that while this was being done, and until reopened to travel, it was relieved by the intervention of the railroad company of all liability for a defective public way caused by the act of reconstruction. But if held not to be exempt it then urges that the barrier and signs which had been put up giving notice of its closure were maintained, or that the general condition of the surface of the street was a sufficient warning to travellers that it was not open. It also denies that it had notice of the defect which caused the plaintiff's injury, and claims that at the time of the accident she was negligent.

The work may be considered as in the nature of specific repairs which ordinarily would be made by the defendant, but if done by the railroad company the character of the general undertaking of which the change of grade formed a part did not relieve the location within the limits of the layout from the public easement. This could be accomplished only by a legal discontinuance either by the defendant, or upon a taking for another



public use. *Tinker v. Russell*, 14 Pick. 279. See *New England Telephone & Telegraph Co. v. Boston Terminal Co.* 182 Mass. 397, 400.

Consequently neither the order, nor the action taken thereunder, worked a discontinuance. It still remained a public way, which the defendant was charged with the primary duty of keeping reasonably safe for the use of travellers. Pub. Sts. c. 52, § 1.

If the alteration formed part of a public improvement over the whole of which the city did not exercise municipal control, yet the street could not lawfully be closed except by its permission when acting within the implied power that necessarily must be invoked to temporarily exclude travellers from a public way that is being partially reconstructed. *Jones v. Collins*, 177 Mass. 444; *S. C. ante*, 53.

By the interposition of the railroad company the city was not deprived of this right of control, nor relieved of its statutory duty. *Currier v. Lowell*, 16 Pick. 170. *Merrill v. Wilbraham*, 11 Gray, 154.

Nor could it delegate this requirement thus directly imposed, and thereby secure exemption from liability to those suffering injury if this duty remained unperformed. *Howard v. Mendon*, 117 Mass. 585. *Blessington v. Boston*, 153 Mass. 409.

But while the alteration called for by the report was being made, the defendant, under the method it adopted, could give notice to the public by signs, or a barrier, that the street had been closed, and if this was done properly then its responsibility would be suspended during the time either or both were maintained, and until it was reopened to travel. *Jones v. Collins, ubi supra*.

That such a barrier, with suitable signs displayed thereon, had been erected by the railroad company before the work of excavating began does not seem to have been in dispute, or that if either had been maintained the plaintiff could not recover.

But if the bars and posts used for this purpose were discontinued before the final grade was finished travellers well might infer that they were at liberty to enter upon and use the street.

Although living in that portion which was being changed, and subjected to considerable inconvenience by the impairment of the opportunity of free access to other streets, or of passing to and



from her house, the plaintiff enjoyed no larger rights than other travellers. If legally closed to them it was closed to her. Thereafter as a traveller she took the risk of any injury received. *Jones v. Collins, ubi supra.*

But there was evidence introduced by her that after the road-bed had been wrought preparatory to finishing it to a surface grade, and before the accident, the barrier had been entirely removed, while ordinary travel had been resumed.

If such removal or discontinuance had taken place, the signs went with it, and except the condition of its surface, and the general character of the work, both of which were open to common observation, there would be no warning that the way was unsafe.

Upon this evidence the jury could find by the length of time it apparently had been left unobstructed, that without any formal declaration by the mayor, or other municipal authorities, of its reopening, their assent to the resumption of travel might be presumed. *Drury v. Worcester, 21 Pick. 44. Jones v. Collins, ubi supra.*

Undoubtedly the defendant's evidence tended to prove, not only that there had been no removal, but the condition of the surface of the street itself indicated that it was not open to the public.

In such a conflict of testimony these issues of fact were for the jury to determine under proper instructions.

If the fact of removal was found, it became the defendant's duty in the exercise of reasonable diligence to take such precautions as were called for to guard or warn travellers of the danger arising from the open trench into which the plaintiff fell. *Blessington v. Boston, ubi supra. Hyde v. Boston, 186 Mass. 115.*

This trench had been dug for the purpose of lowering a water main that formed a part of the water system of the defendant, and if left unguarded it could have been found to have made the street defective and unsafe. *Hyde v. Boston, ubi supra.*

It does not become necessary to decide whether the engineer of the railroad company, who exercised a general supervision over the whole work, in changing the water main acted as the agent of the city by whose knowledge it would be bound, or for whose negligence it would be responsible, as there was plenary evidence



of notice to the defendant of the defect. The mayor of the city, as well as the city council, must be deemed to have known that the street would be rendered dangerous for travel through the very changes to make which permission had been given under their sanction to close it. *Donaldson v. Boston*, 16 Gray, 508, 511. *Prentiss v. Boston*, 112 Mass. 48, 48. *Olson v. Worcester*, 142 Mass. 536.

Furthermore this particular change was being made apparently with the knowledge and consent of the defendant's officers in charge of its water department. *Donaldson v. Boston*, *ubi supra*. *Fox v. Chelsea*, 171 Mass. 297.

There also was evidence for the consideration of the jury of the due care of the plaintiff.

The execution of the plan had extended through quite a period of time, and though the plaintiff admitted that she knew that the street was being lowered to pass under the track of the railroad, she also testified that this had been accomplished some time before the accident, and "it was finished for people to walk on it."

If there were no lights, or guards, to warn or protect her as a traveller while lawfully using it from falling into the trench, the absence of these usual safeguards well might be considered in passing upon her conduct.

How far knowledge on her part of its structural condition, and that the change then under way was a part of a larger enterprise, not fully completed, but of which she had heard, should be held to show negligence in exposing herself on a dark night to the danger of travelling over a street that according to her evidence was unlighted, and not completely finished, were likewise questions of fact. For it must be taken as settled, that knowledge of a traveller that a defect exists in a public way over which he is rightfully passing, is generally not sufficient as matter of law to bar his recovery, for an injury thereby sustained. *Weare v. Fitchburg*, 110 Mass. 334. *Kelly v. Blackstone*, 147 Mass. 448. *Norwood v. Somerville*, 159 Mass. 105. *Flynn v. Watertown*, 173 Mass. 108.

The facts in the case of *Compton v. Revere*, 179 Mass. 413, on which the defendant relies, differ so widely from those of the present case as relied upon by the plaintiff, that it is not an



authority against her right of recovery, nor does it require further comment.

It follows that the rulings requested were refused properly, and the instructions under which the case was submitted to the jury were full and accurate.

The exception to the refusal to grant the defendant's motion for a new trial presents no question of law, and does not call for any discussion. *Fox v. Chelsea, ubi supra.*

*Exceptions overruled.*

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OLD DOMINION COPPER MINING AND SMELTING COMPANY  
vs. ALBERT S. BIGELOW.

Suffolk. December 7, 1904. — June 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Equity Pleading and Practice. Corporation. Equity Jurisdiction.*

An attempted demurrer to a part of a bill in equity may be treated as an assignment of a cause of demurrer to the whole bill.

A promoter stands in a fiduciary relation to a corporation formed by his promotion, and if he buys property personally with a view to selling it to the corporation and sells it to the corporation at an advance he is bound to disclose all material facts relating to the property, or to see that the corporation has adequate independent advice.

A corporation does not lose by acquiescence the right to avoid a purchase of property sold to it by its promoters in exchange for stock without a disclosure of material facts, if at the date of the directors' meeting at which the purchase was made the authorized capital stock was one hundred and fifty thousand shares, of which only forty shares had been issued and these were owned by the promoters, if the directors present at the meeting were the two promoters, their attorney and an employee, if at this meeting it was voted to buy the property in question for thirty thousand shares, to buy other property for one hundred thousand shares and to issue to the public twenty thousand shares, and if of the one hundred thousand shares twenty thousand went to the promoters for promotion services and expenses and eighty thousand to the persons who furnished the promoters with funds to buy the property sold by them to the corporation.

A bill in equity may be maintained by a corporation against one of its two promoters to compel, after rescission by the corporation, the restitution of the consideration received for property sold to it by the promoters at a large profit without a disclosure of material facts, although the title to the property conveyed to the corporation stood in the name of the other promoter who had a half interest in the contract, such other promoter being dead and his executors being residents of another State and not made parties to the suit.



In a suit in equity by a corporation against one of its two promoters to compel, after rescission by the corporation, the restitution of the consideration received for property sold to it by the promoters at a large profit without a disclosure of material facts, the plaintiff, if the property has remained unchanged, not only can offer to restore it and demand the return of the consideration, but also has the remedy of waiving its right to a return of the consideration and seeking damages for the equitable tort committed by the defendant while acting in a fiduciary relation, and on this ground *semble*, that either promoter is liable severally as well as the two jointly.

This court has jurisdiction in equity to compel the restitution of money taken in violation of a fiduciary duty.

In a bill in equity against one acting in a fiduciary relation to the plaintiff there is no inconsistency in a prayer for the rescission of a contract and a prayer for damages.

BILL IN EQUITY, filed October 7, 1902.

The following statement of the case is taken from the opinion of the court:

This cause came on to be heard on two demurrers. The defendant filed a demurrer to the whole bill, and what purported to be a demurrer to so much of the bill "as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." On the plaintiff's stipulating that in case the demurrers or either of them should be sustained on the merits, the bill, or so much thereof as the demurrers apply to, should be dismissed, the cause was reserved for the consideration of the full court.

The case stated in the bill, so far as material here, is in effect as follows. The defendant and one Lewisohn, at some time before March, 1895, formed the plan of buying the property of the Old Dominion Copper Company of the City of Baltimore (hereinafter spoken of as the Baltimore company), and four certain mining claims and a mill site standing in the name of one Keyser (hereinafter spoken of as the real estate here in question), with a view to reselling them at a profit to a corporation to be organized by them for that purpose. Their scheme was first to buy all the stock of the Baltimore company. Having got control of that company through their ownership of all of its capital stock, they were to organize a new company, and before the stock of the new company was issued and while it was entirely in their control as the organizers of it, they were



to sell to it the property of the Baltimore company and the real estate here in question, for a specified number of shares of the new company, the balance of shares in the capital stock of the new company being sold to the public to provide working capital and to build additions. All this was done. The plaintiff was the new corporation. The defendant and Lewisohn got the money with which to buy all shares in the capital stock of the Baltimore company from a syndicate (hereinafter called the Dominion Syndicate) which they organized for the purpose and to which they agreed to pay two dollars for every dollar paid into the syndicate treasury in case the scheme was a success, with a privilege given to the syndicate members of taking shares at par in the new corporation in place of money. Five-sevenths of the stock of the Baltimore company were bought of the executors of one Simpson, for a sum not more than \$613,137.39; and the other two-sevenths, together with the real estate here in question, of one Keyser and "other persons to the plaintiff unknown," for a sum not exceeding \$175,182.11; and thereupon the real estate here in question was conveyed to Lewisohn. These transactions were carried through on July 8, 1895. On the same eighth day of July, 1895, the plaintiff corporation was organized by seven persons employed by the defendant and Lewisohn for the purpose, apparently with a capital stock of \$1,000, divided into forty shares of \$25 each, which were issued to the incorporators but were in fact paid for by the defendant and Lewisohn. On July 9, 1895, the incorporators met, chose themselves directors, and increased the authorized capital stock from \$1,000 to \$3,750,000, composed of one hundred and fifty thousand shares of \$25 each. At a meeting of the directors held on July 11, 1895, pursuant to instructions from the defendant, five directors resigned, and the defendant and Lewisohn, together with three members of the Dominion Syndicate, were appointed in their places. Thereupon the defendant and Lewisohn took their seats on the board. The other three new directors were not present. After these changes in the directorate, the directors present at the meeting were the defendant, Lewisohn, one Evarts, "the attorney employed by said defendant and said Leonard Lewisohn to attend to the incorporation of the plaintiff corporation and to carry out their said plan and conspiracy," and one Buffam, a person

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“selected” and “employed” by the defendant and Lewisohn “to act as director and assist them in carrying out said plan and conspiracy.” Thereupon the defendant through said Evarts presented to the board an offer to sell to the plaintiff corporation the property of the Baltimore company for one hundred thousand shares in its capital stock, and Lewisohn offered to sell to the plaintiff corporation the real estate here in question for thirty thousand shares in its capital stock. These offers were accepted and the stock was in fact subsequently issued in accordance therewith. Of the thirty thousand shares issued for the real estate here in question the defendant received sixteen thousand four hundred and ten, and Lewisohn thirteen thousand five hundred and ninety. Of the one hundred thousand shares issued for the property of the Baltimore company, eighty thousand were issued to the syndicate, and the other twenty thousand were issued to the defendant and Lewisohn for their expenses and services. Of this twenty thousand the defendant received ten thousand nine hundred and forty, and Lewisohn nine thousand and sixty. It is alleged that at this time the fair market value of the shares in the capital stock of the plaintiff corporation was par, and “continued for a long time thereafter to be of such or greater value.”

7. | The bill goes on to allege that no disclosure was made of the profit made by the issue of the thirty thousand shares for the real estate here in question to the persons who subscribed for the twenty thousand shares issued for working capital, or to the members of the syndicate to which the eighty thousand shares were issued (except to the defendant and Lewisohn, members thereof). It is alleged also that from July 11, 1895, to July 4, 1902, the plaintiff corporation was in effect in control of the defendant and Lewisohn. Thereafter investigations were begun which resulted in the filing of this bill on October 7, 1902. It is alleged further that Lewisohn died on March 5, 1902, and at the time of his death was a resident and citizen of the city of New York; that the executors of his will are also residents and citizens of the city of New York; that no executors or legal representatives have been appointed or are within this Commonwealth; that there is no property within the Commonwealth belonging to said estate; and that it is impossible to get service within



this Commonwealth on the executors of the will of Lewisohn. It is also alleged that the real estate here in question, at the time of the sale to the plaintiff, was "of substantially no value, to wit, of a value not exceeding five thousand (5,000) dollars, and . . . [was] . . . known by said Lewisohn and by the defendant when" they acquired the same and when they offered to sell the same to the plaintiff, "to be of substantially no value"; and that said "property has since said conveyance remained undeveloped and is now in substantially the same condition that it was in at the time of the conveyance" to the plaintiff.

The plaintiff alleges that it "desires to rescind the sale" of said real estate, "and has offered to convey" it "to the defendant, or to such person as he may request, upon receiving from said defendant" said thirty thousand shares, "or if and in so far as said shares have been disposed of, upon said defendant's duly accounting therefor; but said defendant refused to make any such restitution or accounting." After alleging a continued readiness to convey, the bill concludes with a prayer that the court will declare the sale of the mining claims and of the mill site rescinded, and will direct the defendant to return the thirty thousand shares or, if and in so far as said shares are no longer in his control, to account to the plaintiff therefor, or, in the alternative, in case it is held that the sale is not rescinded and that the plaintiff is not entitled to rescind that sale, for damages. There is also a prayer for general relief.

It was stated at the bar that another bill had been brought for relief in respect of the issue of the one hundred thousand shares, and that the only relief here sought was in respect of the thirty thousand shares issued in payment for the real estate here in question.

The result of these transactions was that for the property for which the defendant and Lewisohn had paid not more than \$788,319.50, the plaintiff corporation issued one hundred and thirty thousand shares of its capital stock having a market value of at least \$3,250,000, a profit of at least \$2,460,000. Of these one hundred and thirty thousand shares, eighty thousand (which were worth at least \$2,000,000) went to the syndicate; twenty thousand (worth at least \$500,000) went to the defendant and Lewisohn for services and expenses; and thirty thousand (worth

*Relief  
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27.*



at least \$750,000) went to the defendant and Lewisohn for the real estate here in question; and the balance, twenty thousand, to the public (apparently with the exception of the original forty shares issued to the incorporators and paid for by the defendant and Lewisohn).

*L. D. Brandeis & W. H. Dunbar*, for the plaintiff.

*A. Hemenway*, (*J. W. Farley* with him,) for the defendant.

LOBING, J. [After the foregoing statement of the case.] The only question now before us is whether the plaintiff is entitled to any relief on these facts. If it is, it is not necessary to determine what that relief is. An attempt has been made to force a decision on the nature of the relief at this time by demurring "to so much of said bill as seeks to have the sale of certain parcels of real estate conveyed to the plaintiff by Leonard Lewisohn rescinded, and to have the defendant ordered to return to the plaintiff the consideration paid by the plaintiff for said conveyance." But there is no part of the bill which seeks rescission. This demurrer is not a demurrer to a part of the bill; it is to the whole bill so far as it seeks rescission. This so called demurrer to a part is in fact an assignment of causes of demurrer to the whole bill, and will be so treated.

The defendant has contended that on the facts stated in the bill no case is made out for relief in respect of thirty thousand shares issued for the four mining claims and the mill site.

It will be useful to get a clear conception of what is and what is not alleged in the bill, and of the rights of the parties in such a transaction as that here set forth.

It was settled by the recent case of *Hayward v. Leeson*, 176 Mass. 310, that a promoter of a corporation stands in a fiduciary relation to the corporation of which he is a promoter.

It is clear that on the facts stated the defendant was a promoter of the plaintiff corporation.

It is not alleged here that the defendant made any misrepresentation as to the price paid by himself and Lewisohn for the property resold to the plaintiff at an advance, as was the case in *Gluckstein v. Barnes*, [1900] A. C. 240; *S. C.* below, *sub nomine In re Olympia*, [1898] 2 Ch. 153; *Hichens v. Congreve*, 4 Sim. 420. Where one standing in a fiduciary relation makes such a misrepresentation it may well be that the purchaser can keep



the property and force the vendor to make good the representation by paying to him, the purchaser, the difference between what was in fact paid by the vendor and what he represented that he paid for it.

Further, the defendant is not liable here on the ground that the plaintiff corporation is entitled to the benefit of the original purchase of the real estate here in question, as a beneficiary is entitled where a person standing to him in a fiduciary capacity buys for himself and resells to him, the beneficiary, at a profit when he ought originally to have bought for the beneficiary. In such a case the purchaser can keep the property and charge the defendant with the difference in price, *Parker v. Nickerson*, 137 Mass. 487, 497.

When the defendant and Lewisohn bought this real estate they were under no obligation to make the purchase of it for the plaintiff corporation, which was not then in existence. Having bought the property at that time and paid for it with what as between them and the plaintiff corporation was their own money, they could have kept it or resold it to the plaintiff corporation or to anybody else, as they saw fit. The fact that the property was bought with a view to reselling it to a corporation to be organized for the purpose, and that that purpose was ultimately carried into effect, does not give to the corporation subsequently organized in execution of the original purpose a right to the benefit of the purchase. That was considered in *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 118, 119; and at still greater length in that case on appeal, *Erlanger v. New Sombrero Phosphate Co.* 3 App. Cas. 1218, by Lord Hatherley, at p. 1242, Lord O'Hagan, at p. 1255, and Lord Blackburn, at pp. 1267 and 1268. It is enough to say that we agree with what is there said. For a case where no relief was given because it was not made out that the company was entitled to the benefit of the original purchase, see *Ladywell Mining Co. v. Brookes*, 35 Ch. D. 400.

The situation then was this. The defendant and Lewisohn were, so far as this case goes, the absolute owners of the four mining claims and the mill site. We say the absolute owners so far as this case is concerned, because the rights of the Dominion Syndicate in this real estate, if any, are not here in question, and



therefore so far as this case is concerned their rights, if any, may be disregarded. Being the absolute owners of it, the defendant and Lewisohn could do with that property as they pleased,—let it lie idle, work it, or sell it, as they thought best, and if they determined to sell it they could sell it to any one they might choose. If they chose to sell it to a stranger they could make the sale at arm's length, they could ask any price they pleased, and were under no legal obligation to state what it had cost them. On the other hand, if they elected to make a sale of it to one standing to them in a fiduciary relation, they were under an obligation to make a full disclosure to the beneficiary of all the facts known to them material to the property and the purchase, or see to it that the fiduciary had adequate independent advice. That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself.

There is no pretence that in the transaction in question the plaintiff corporation was represented by an independent board.

The defendant has sought in the first place to distinguish the case at bar from *Hayward v. Leeson*, 176 Mass. 310, on the ground that in the prospectus in that case there was the false statement that the capital stock represented actual value, without inflation, while a substantial part of it had been issued to the defendants and their associates for nominal services. But that fact was not spoken of in the opinion as the ground of the decision. The opinion went on the broad ground mentioned above. This false representation was spoken of in connection with a contention on the part of those defendants that they were not liable because of a finding made by the Superior Court that the defendants did not conceal the transaction from the knowledge of future stockholders. The case of *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; *S. C.* on appeal, *Erlanger v. New Sombrero Phosphate Co.* 3 App. Cas. 1218, is on all fours with the case at bar in this respect. In that case there was no misrepresentation.

In the second place the defendant contends that the corporation cannot complain because the facts were known to the four directors who took part in the purchase and to the holders of all



shares of capital stock of the corporation outstanding when the contract of purchase here in question was made, and because the purchase was acquiesced in by them. Their contention is that this result follows because one buying shares from a shareholder who acquiesces is bound by the acquiescence of his vendor. The four directors present at the directors' meeting when the real estate in question was sold by the defendant and Lewisohn to the plaintiff corporation for thirty thousand shares, were the defendant and Lewisohn, their attorney, and one Buffam, "a person selected by them and employed by them to act as director and assist them in carrying out said plan and conspiracy." On the allegations of the bill the defendant and Lewisohn are to be treated as the owners of all the shares then outstanding, and therefore the transaction is to be taken to have been known to and acquiesced in by all the then stockholders.

It is proper to pause here and see just what this contention means. When this contract was made on July 11, 1895, the authorized capital stock had just been increased from forty shares to one hundred and fifty thousand shares of \$25 each, that is to say, from \$1,000 to \$3,750,000. Of the authorized capital stock, only forty shares, or \$1,000 had then been issued. As we have said, these forty shares are to be treated on the allegations of the bill as the property of the defendant and Lewisohn. The scheme of the defendant and Lewisohn as to this capital stock of \$3,750,000, divided into one hundred and fifty thousand shares, was to issue eighty thousand shares (or \$2,000,000) to the syndicate, or sell them to the public for cash to provide \$2,000,000 to be paid to the syndicate; twenty thousand shares (or \$500,000) to themselves for their services and expenses as promoters; twenty thousand shares (or \$500,000) to the public for cash for working capital; and the balance, thirty thousand shares (or \$750,000) to themselves for the real estate here in question. And this scheme was carried out. In carrying it out no disclosure was made to the persons who took the syndicate's eighty thousand shares (except those of the eighty thousand issued to the defendant and Lewisohn as members of the syndicate), nor to those who took the twenty thousand shares sold to the public for cash for working capital. Of the eighty thousand issued to or for the syndicate it is alleged that



the defendant received four thousand. It is not alleged that any of this eighty thousand were issued to Lewisohn. The contention is that inasmuch as the defendant and Lewisohn owned all the forty shares of the corporation, amounting to \$1,000, outstanding when the sale here in question was made by them to the corporation, the corporation is barred from complaining that a full disclosure of the material facts was not made by them to it.

Since the argument was made in the case now before us it has been decided by the Circuit Court of the United States for the Second Circuit in *Old Dominion Copper Mining Co. v. Lewisohn*, 136 Fed. Rep. 915, that this contention is correct. In that case a demurrer was sustained to a bill against the executors of Lewisohn, which is the counterpart of the bill now before us, on the ground that the point was concluded by two earlier cases, one in that court, *Foster v. Seymour*, 23 Fed. Rep. 65, and the other in the Court of Appeals in that Circuit. *McCracken v. Robison*, 57 Fed. Rep. 375.

*Foster v. Seymour*, 23 Fed. Rep. 65, was a case where the owners of a mine conveyed it to a corporation organized by themselves in payment for all its capital stock, to the par value of \$10,000,000. The owners of the mine were the trustees of the corporation when the exchange was made. Afterwards this stock was sold on the market. The thing complained of in *Foster v. Seymour* was that the mine was in fact worth only \$100,000. A stockholders' bill was brought in behalf of the corporation to make the trustees "account to the corporation for a fraudulent disposition of its capital stock." The statute under which the corporation was organized provided that stock could be paid for in property. It is to be observed of this case that the bill did not seek to set aside the purchase for a failure to disclose a material fact in selling the property of the company. The thing complained of was not that the property had been bought for \$100,000 and sold for \$10,000,000. It was that the mine in payment for which the whole capital stock of the corporation was issued was in fact worth only \$100,000.

The other case on the authority of which *Old Dominion Copper Mining Co. v. Lewisohn* was decided (*McCracken v. Robison*, 57 Fed. Rep. 375) is a case where four men, including the defendant in error, Robison, by the expenditure of their own



moneys organized a corporation to build a specified railroad, subscribing for the proportion of stock required as a preliminary by the laws of Michigan, procured the right of way and local aid in the form of donations of land and money to the enterprise, and with such assistance and with their own moneys undertook to furnish the roadbed and cross ties for the whole road ready for laying the track and completing the superstructure. They then caused the corporation to agree with the plaintiffs in error in consideration of their (the plaintiffs in error) agreeing to complete the road, to issue to them (the plaintiffs in error) all the capital stock and bonds of the corporation, the plaintiffs in error agreeing to pay the defendant in error individually one half the profit afterwards commuted by agreement to \$150,000. For this \$150,000 this action was brought, and the plaintiffs in error set up in defence that the contract sued on was an illegal contract on which no action could be maintained in a court of law. Here the capital stock and bonds were issued to the plaintiffs in error for laying the track and completing the superstructure of a road of which the right of way, the roadbed, grading and cross ties had been paid for by the defendants in error and by the donations and not by the corporation or the plaintiffs in error. So long as the corporation did not complain of the transaction, there would seem to be no reason why an agreement by which the incorporators were to be reimbursed for money expended by them in building the road was not valid.

In both *Foster v. Seymour* and *McCracken v. Robison* (in addition to what has been pointed out above) all the capital stock was issued to the directors and promoters who made the sale to the corporation complained of in payment for the property so sold. In such a case the transaction complained of is acquiesced in not only by all those interested but by all who it is contemplated shall be interested in the corporation except as third persons should acquire the interest of some one or more of those persons. Such third persons are bound by the acquiescence of their vendors, and such a corporation is bound by the acquiescence of all its stockholders. See *In re Ambrose Lake Tin & Copper Mining Co.* 14 Ch. D. 390. See also *In re Postage Stamp Automatic Delivery Co.* [1892] 8 Ch. 566.

It is hardly necessary to point out the difference between such



a case, where the scheme of the corporate organization does not contemplate there being any stockholders other than those who buy the stock issued in the transaction complained of, and a case like that now before us, where ninety-six thousand out of one hundred and fifty thousand shares are to be issued to persons to whom no disclosure was made.

Again, the case stated in the bill now before us does not come within the decision in *In re British Seamless Paper Box Co.* 17 Ch. D. 467, where all persons acquiesced who were to have an interest so far as the scheme went which the parties then had, and where there was a subsequent change made in the scheme in good faith by which other persons were brought in,

The case submitted to us for decision here by the defendant's demurrer to this bill is a case where (disregarding the forty shares subscribed for to organize the corporation) the whole capital stock was one hundred and fifty thousand shares, of which fifty-four thousand shares were to be issued to the promoters for services and for the sale of the land here in question, and the remaining ninety-six thousand were to be issued to persons to whom the facts of this sale were not disclosed.

The question arises whether in such a case the rule enforced in *Hayward v. Leeson*, 176 Mass. 310, applies.

In *Hayward v. Leeson* it was held by this court that a corporation was not barred in the recovery of secret profits made by promoters by the fact that the promoters owned all the stock of the corporation when the agreement was made to pay them the profits recovered in that case. The secret profits agreed upon, paid and recovered in that case were paid up shares of capital stock of the par value of \$700,000 for services as promoters out of a capital of \$3,000,000, the rest of which was subscribed to and paid for by the public in cash. To the cases cited in *Hayward v. Leeson* on this point, 176 Mass. at p. 320, should be added *Gluckstein v. Barnes*, [1900] A. C. 240, the decision of the House of Lords on appeal from *In re Olympia*, [1898] 2 Ch. 153, made after the opinion in *Hayward v. Leeson* was written.

The question which we have to decide here is whether the difference in the way in which this transaction was carried through leads to the opposite result. If in the case at bar the ninety-six thousand shares not issued to the promoters had been



offered to the public for cash to be used in buying the property of the old Baltimore company and for working capital, and had been taken by them, the case at bar would have come directly within the decision in *Hayward v. Leeson*.

We see no reason why the rule enforced in *Hayward v. Leeson* does not apply to the case stated in the bill now before us.

The defendant has insisted that the corporation is barred in this case because if it (the corporation) is allowed to recover in such a suit, the purchasers of the fifty-four thousand shares issued to the defendant and Lewisohn would get their share of the sum recovered and to that extent the purchasers of these shares would not be bound by the acquiescence of their vendors. That is true. That was true in *Hayward v. Leeson*. In that case the purchasers of the seven hundred and fifty thousand shares would have got their share of the sums recovered by the receiver in behalf of the corporation if there was any part of those sums left after the debts were paid. The argument is an old one and was disposed of by Lord Justice James in *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 118, 119. A corporation is not precluded from recovering for a fraud on it (the corporation) because the party committing the fraud is a stockholder.

Again, the corporation is not barred because when the agreement was made it acquiesced in the trade and it was then, from a legal point of view, fully born. That was equally true in *Hayward v. Leeson* and the cases cited in that case. The answer to that suggestion is that from a business point of view the agreement was not made to bind the corporation with a capital of \$1,000 which was the corporation then in fact in existence, but to bind the corporation with a capital of \$3,750,000. It was to that corporation with a capital of \$3,750,000 that a full disclosure ought to have been made, and to that corporation no disclosure ever was made.

On the case stated in this bill the defendant was a promoter of the plaintiff corporation; being a promoter he stood in a fiduciary relation to it; on selling to the plaintiff the real estate here in question he was bound to disclose all facts known to him material in the sale since it was not independently represented; the price at which the property recently had been bought with a view to reselling it to the plaintiff corporation was at any rate a



material fact which he was bound to disclose; the knowledge of the defendant and Lewisohn was not equivalent to a disclosure to the plaintiff corporation, although they owned all the stock of the plaintiff corporation outstanding at the time the sale was made; and although fifty-six thousand out of one hundred and fifty thousand shares of the capital stock ultimately issued were issued to them; the defendant violated the duty which he owed the plaintiff in not disclosing that fact; and for this reason the contract here in question was not binding on the plaintiff.

On the facts stated the property sold having remained unchanged, the contract came to an end on the plaintiff's electing to rescind and tendering a reconveyance of it back to the defendant.

The only question of importance left is whether this bill can be maintained in the absence of the executors of the will of Lewisohn, who has since died.

The fact that the legal title to the real estate here in question stood in Lewisohn's name is not fatal to the plaintiff's maintaining this bill. Had the defendant been the sole owner, the fact that the title stood in the name of a man of straw and the contract had been made with the man of straw would not have made any difference in the result that the contract was ended. The fact that Lewisohn, also a promoter, had about a half interest in the contract does not affect the result unless his death and the fact that his executors reside in New York and that no legal representatives of his estate have been appointed or can be appointed in Massachusetts make a difference.

We are of opinion that these facts do not make a difference in the right of the plaintiff to maintain this bill.

On the contract thus coming to an end by the offer to restore the property which had remained unchanged, the defendant and Lewisohn were bound as matter of contract to return the consideration received by them under this contract. But in our opinion that is not the only remedy open to the plaintiff. The thirty thousand shares were obtained from the plaintiff by the defendant and Lewisohn in violation of the duty owed to it by them by reason of the fiduciary relation in which they stood to the plaintiff. The fact that on the rescission of the contract the plaintiff corporation could have sued to recover back from the



parties to the contract the consideration received by them under it does not preclude the plaintiff from charging the defendant directly with the violation of this fiduciary duty and compelling him to make restitution of what was so acquired by them. The plaintiff can waive its remedy founded on the implied contract to return the consideration on the contract's being rescinded, and sue for the tortious violation of the duty owed by them to it because they stood to it in a fiduciary relation. In a suit founded on such an equitable tort Lewisohn's executors are not necessary parties. Such a bill may be brought against either.

Although the allegation made in the bill as to the real estate here in question remaining undeveloped and unchanged makes a decision on the point unnecessary, it is proper to point out that it has been laid down in this Commonwealth that in some cases a party to a contract who has a right to rescind is entitled to some remedy where the article sold has been consumed or altered before he has become aware of the facts which give him that right. *Parker v. Nickerson*, 137 Mass. 487. As to what the law is in England on this point, see *Ladywell Mining Co. v. Brookes*, 35 Ch. D. 400; *In re Cape Breton Co.* 29 Ch. D. 795; *S. C.* on appeal, *sub nom. Bentinck v. Fenn*, 12 App. Cas. 652. See also *In re Ambrose Lake Tin & Copper Mining Co.* 14 Ch. D. 890, 894.

It is hard to see why the defendant is not liable *in solido* for the whole thirty thousand shares, including those received by Lewisohn. See *Hayward v. Leeson*, 176 Mass. 310, 324, and cases there cited, to which should be added *Gluckstein v. Barnes*, [1900] A. C. 240; *Trull v. Trull*, 13 Allen, 407. But it is not necessary to express a final opinion on this point.

If the defendant does in fact restore the whole consideration, he will be subrogated to the real estate here in question, on the same principle on which a trustee making restitution of money improperly invested is subrogated to the improper investment.

A few technical objections remain to be disposed of, namely:

1. That the plaintiff has a complete and adequate remedy at law. There is a remedy in equity to compel restitution of money taken in violation of the duty owed by a fiduciary. *Hayward v. Leeson*, 176 Mass. 310, is an example. See also *Warren v. Para Rubber Shoe Co.* 166 Mass. 97, 104. This court now has full equity jurisdiction. *Niles v. Graham*, 181 Mass. 41.



2. The defendant contends that the allegations as to the purchase of the property of the Baltimore company either are surplusage and are to be disregarded, or they make the bill multifarious. As no relief in respect to those allegations is sought here, the bill is not made multifarious by them. So far as necessary to tell the story of the sale here complained of, it was proper to describe the sale of the Baltimore company's property, and those allegations, to that extent, are not surplusage.

3. We see nothing inconsistent in the prayer for a rescission of the contract and in the prayer for damages by which (although inaptly put) we suppose the plaintiff intended what we have held it is entitled to.

The entry must be that

*The so called demurrer as to part of the bill shall stand as an assignment of a cause of a demurrer; demurrer overruled.*



COMMONWEALTH vs. JOHN O'NEIL & another.

Suffolk. January 16, 1905. — June 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Larceny. Practice, Criminal, Sentence.*

Under R. L. c. 215, § 6, cl. 4, by which the punishment for an attempt to commit a crime cannot exceed one half the punishment provided for the crime itself, a person convicted of an attempt to commit larceny from the person can be sentenced under R. L. c. 208, § 24, for two and one half years in the house of correction. This is not affected by the indeterminate sentence act now contained in R. L. c. 220, § 20.

INDICTMENT, found and returned in the Superior Court for the county of Suffolk on December 10, 1904, against John O'Neil, otherwise called George Seymour, and Thomas O'Donnell, for an attempt on November 18, 1904, to commit larceny from the person of one to the jurors unknown.

In the Superior Court before *Harris, J.* the defendants pleaded guilty to the part of the indictment charging the offence named above, and the judge sentenced each of them to the house of



correction for a term of two and one half years. The defendants excepted to the imposition of the sentences.

*F. F. Sullivan*, (*J. M. Sullivan* with him,) for the defendants.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth, submitted a brief.

LORING, J. But one question is raised in these cases, to wit: Can a sentence of two and one half years in the house of correction be imposed for an attempt to commit larceny from the person?

The defendants contend that it cannot. Their contention is that one year in jail or in the house of correction is the only punishment that can be imposed.

Their argument is this: For an attempt to commit a crime the maximum imprisonment is one half the maximum for the crime itself. R. L. c. 215, § 6, cl. 4. Before the indeterminate sentence act was enacted, (St. 1895, c. 504, amended by St. 1897, c. 294, and now R. L. c. 220, § 20,) the maximum imprisonment for the crime here in question (larceny from the person) was "imprisonment in the State prison for not more than five years or in jail for not more than two years." R. L. c. 208, § 24. This made the maximum for the attempt two and one half years in the State prison or one year in jail.

Then came the indeterminate sentence act, St. 1895, c. 504, which provided that the court, in sentencing a convict (of the class here in question) to the State prison, should not fix the term of his imprisonment, but should establish a maximum and minimum term, and that the minimum term should be not less than two and one half years.

The result (so these defendants argue) is this: Before the indeterminate sentence act, two and one half years was the maximum imprisonment in State prison for the attempt in question, and the effect of that act was to abolish imprisonment in the State prison for the attempt in question, since the maximum for that attempt is two and one half years in the State prison and that act forbids imprisonment in the State prison where the minimum of the indeterminate sentence is less than two years and a half. This left imprisonment in jail the only punishment, and that (as we have stated) is for not more than one year, which sentence is to be executed in jail or the house of correction, under R. L. c. 220, § 19.



The difficulty with this argument is that if the defendants' reasoning is right the crime here in question ceased to be punishable by imprisonment for more than one year in jail on the enactment of St. 1877, c. 190, which forbade a convict being sentenced to the State prison for a term less than three years in place of one year, as was the case before that act was passed. See Rev. Sts. c. 139, § 9; Gen. Sts. c. 174, § 17.

But it was decided in *Lane v. Commonwealth*, 161 Mass. 120, that St. 1877, c. 190, (then Pub. Sts. c. 215, § 20,) did not have that effect. This conclusion was reached on the ground that St. 1877, c. 190, was an act dealing solely with the place where a sentence was to be executed, and was not an act which changed a previous statute describing the punishment which could be inflicted; consequently that so far as punishment went a convict still could be sent to prison for a term not exceeding that prescribed in a former act as a term in State prison, and that that sentence must be executed in the house of correction. This result was rendered possible by what was then Pub. Sts. c. 215, § 19, (now R. L. c. 220, § 19,) providing that "When the punishment of solitary imprisonment and confinement at hard labor for a term not exceeding five years is awarded by the court against a convict, such sentence may be executed either in the State prison, jail, or house of correction, except as provided in the following section." To the same effect see *Brown's case*, 152 Mass. 1, 3.

Under St. 1877, c. 190, (re-enacted in Pub. Sts. c. 215, § 20,) the crime here in question (an attempt to commit larceny from the person) was punishable by imprisonment in the house of correction for a term not exceeding two and one half years. This result was not affected by the enactment of the indeterminate sentence act, (St. 1895, c. 504,) which repealed Pub. Sts. c. 215, § 20, (re-enacting St. 1877, c. 190,) and substituted for the three years' term specified in St. 1877, c. 190, (Pub. Sts. c. 215, § 20,) a minimum sentence of two and one half years.

*Lane v. Commonwealth*, 161 Mass. 120, and *Brown's case*, 152 Mass. 1, 3, as to the effect of St. 1877, c. 190, (then Pub. Sts. c. 215, § 20,) dispose of the contention here made as to St. 1895, c. 504 (now R. L. c. 220, § 20).

*Exceptions overruled; judgment affirmed.*



**JENNIE J. THORPE vs. ALONZO M. WHITE & others.**

Suffolk. March 27, 1905. — June 19, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Bills and Notes. Negotiable Instruments Act.*

Under R. L. c. 78, § 141, a holder of a promissory note in due course, although it has been materially altered without the consent of the indorser, may enforce payment of the note according to its original tenor against such indorser, if the holder was not a party to the alteration.

BILL IN EQUITY, filed May 9, 1904, against Alonzo M. White, the maker, and Hannah C. Hand, an indorser before delivery, of a promissory note for \$500 dated April 30, 1903, and payable, before alteration, on April 30, 1904, to enforce the payment of the note by the defendant Hand and to set aside certain conveyances of real estate alleged to be fraudulent, there being also two other defendants.

In the Superior Court the case was referred to a master, who found that the plaintiff was entitled to a decree against the defendant White for the amount of the note and interest, and ruled that the words written on the note by the payee after delivery, which are mentioned in the opinion, constituted a material alteration of the note which discharged the defendant Hand from liability. The plaintiff excepted to the ruling of the master, and the judge of the Superior Court overruled the exception and made a final decree ordering that the master's report be confirmed. The plaintiff appealed.

*H. C. Attwill*, (*C. A. Parker* with him,) for the plaintiff.

*H. T. Richardson*, for the defendants.

BRALEY, J. The defendant, Hannah C. Hand, irregularly became a party to the promissory note set forth in the bill of complaint, as before delivery she signed her name in blank on the back of an instrument of which the defendant White, was the maker, and the plaintiff the payee. *Dubois v. Mason*, 127 Mass. 37, 38. According to the law relating to negotiable promissory notes before the St. of 1898, c. 533, § 4, cl. 1, took effect, she would have been liable as a promisor between herself and



the plaintiff, though entitled to notice as if she were an indorser when the note was not paid at maturity by the maker. *Fay v. Smith*, 1 Allen, 477, 478. *Brooks v. Stackpole*, 168 Mass. 537. *Black v. Ridgway*, 131 Mass. 80, 84.

But after the negotiable instruments act became operative this distinction was abolished, and the effect of her signature was to make her an indorser as to all parties. R. L. c. 73, § 81.

After she had signed, and given the note to White, he wrote in the body of it, without her knowledge, or consent, the words "with the privilege of renewal for one year from April 30, 1904," and then delivered it to the plaintiff, who took it without knowing of this change. See *Draper v. Wood*, 112 Mass. 315.

If such an alteration had been made by the plaintiff after delivery, and it was found to have been material, the defendant would have been relieved from the performance of her promise. But if deemed immaterial she would have been held liable. *Lee v. Butler*, 167 Mass. 426, 430. *Gaylord v. Pelland*, 169 Mass. 356, 360. *Jeffrey v. Rosenfeld*, 179 Mass. 506. *James v. Tilton*, 183 Mass. 275. *Rowe v. Bowman*, 183 Mass. 488.

It, however, becomes unnecessary to decide whether this rule should be applied where the change was made under the conditions previously stated, for either way the defendant was not discharged.

The note was put in circulation as a contract on delivery to the payee, who, upon acquiring title by its negotiation, thus regularly became a holder within the provisions of R. L. c. 73, § 69. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 144. *Mehlinger v. Harriman*, 185 Mass. 245. *Baldwin v. Dow*, 130 Mass. 416.

By reason of her being an owner, or holder, in due course without notice of the alteration, under the provisions of § 141 of this chapter she can enforce payment of the note according to its original tenor.

The decree of the Superior Court dismissing the bill as to all the defendants except White must be reversed, and the exception of the plaintiff to the master's report sustained.

*Decree accordingly.*



ADOLPH KLOPOT vs. METROPOLITAN STOCK EXCHANGE.

Suffolk. November 15, 1904. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Release. Wagering Contracts.*

An absolute and unequivocal release must be construed in accordance with its terms although these embrace matters not in the minds of the parties at the time of its execution.

Releases under seal attached to certain contracts relating to the purchase of stocks on margins, signed by the purchaser under a fictitious name in which he had been carrying on the transactions, releasing a stock exchange corporation from all demands on the contracts to which the releases were attached and also from any claim or demand under R. L. c. 99, "for any payment at any time heretofore made . . . either on within or any other contract or transaction whatever," are a bar to all claims of a similar character on accounts previously carried on by the signer under his own name although closed more than two years before, and it does not matter that when the releases were executed the officers of the corporation to whom they were made did not know that the person who executed them was the same person who carried on the former transactions, nor does it matter that at the time the releases were executed the person who signed them had brought an action under St. 1890, c. 437, to recover the margins paid on the former transactions and had obtained an auditor's report in his favor.

MORTON, J. This is an action to recover money paid to the defendant by the plaintiff on alleged wagering contracts. The case was heard by a judge of the Superior Court without a jury. The judge found for the defendant, and the case is here on exceptions by the plaintiff to the refusal of the judge to give certain rulings that were asked for by him.

The transactions between the plaintiff and the defendant related to the purchase of stocks on margins, and there were two series of them; one in one office under the plaintiff's own name, and the other in another office under the fictitious name of A. K. Clark, both offices belonging to the defendant. The first series of transactions terminated in May, 1901, and this action, under St. 1890, c. 437, was brought thereon in the same month of that year and has been pending ever since. In May, 1903, a report in favor of the plaintiff for the amount claimed and interest was filed by the auditor. The other series of transactions took place in July and August, 1903. They were entirely separate and



distinct from the first series, and the plaintiff carried them on "under the name of A. K. Clark, in order to differentiate them completely from the transactions sued on." In the course of these transactions eleven releases were given by the plaintiff to the defendant varying as to dates and amounts, but otherwise identical. One of them is as follows: "Boston, July 28, 1903. Received of the Metropolitan Stock Exchange, eleven dollars, in full of all demands under within contract, and I hereby release and discharge the Metropolitan Stock Exchange, its officers, agents and servants, and each of them, therefrom, and also from any and all right of action, claim or demand under or by virtue of chapter 99 of the Revised Laws of Massachusetts, or any amendment thereof, for any payment at any time heretofore made or value of anything at any time heretofore delivered either on within or any other contract or transaction whatever, and I covenant never to sue therefor them or either or any of them. Witness my hand and seal the day and year above written. A. K. Clark (seal)." The exceptions recite that "there was no evidence tending to show that the defendant was aware of his [the plaintiff's] identity at the time of any of the releases or at the time of any of the transactions in which the releases were given." And it does not appear, if material, when the defendant discovered the identity of the plaintiff with A. K. Clark, but apparently not till some time after this suit had been brought.

There are two questions: 1st. Whether the releases in the name of A. K. Clark operate upon the transactions conducted by the plaintiff in his own proper name, and, 2dly, if they do whether they can or should be construed to include the present cause of action. 1. It is to be observed that the plaintiff executed the releases and delivered them to the defendant in his own proper person and as and for contracts made by himself personally with the defendant; and that the defendant took them from him personally as and for contracts between it and the plaintiff in his own proper person; circumstances which did not appear in *Bartlett v. Tucker*, 104 Mass. 336, and which, if they had appeared, would presumably have led to a different result in that case. The question is one of identity and not of name, of the person executing the releases and not of the name under



which he signed them. It was the rights belonging to the person, whatever his name, that were released. It is immaterial that the defendant did not know that he was the same person who had been operating under the name of Adolph Klopot. Whatever rights he had attached to his personality and not to his name. If he wished to except from the operation of the releases the transactions conducted by him under the name of Adolph Klopot, the releases should have contained a provision to that effect. We think that the releases must be held to have operated upon the transactions conducted by the plaintiff under his own proper name. 2. The releases are general releases. It is no doubt true that words of general release occurring in an instrument will be limited to a particular demand if it manifestly appears from the whole instrument that such was the intention of the parties. *Rich v. Lord*, 18 Pick. 322. *Averill v. Lyman*, 18 Pick. 346. But in the present case not only are particular demands released, but also all rights of action, claims or demands under and by virtue of chapter 99 of the Revised Laws for any payment previously made on the contract on which the release was indorsed or on any other contract, or transaction whatever. The case comes within *Wall v. Metropolitan Stock Exchange*, 168 Mass. 282, *Shea v. Metropolitan Stock Exchange*, 168 Mass. 284, and *Clark v. Roberts*, 180 Mass. 259, and we do not see how the effect of those decisions can be avoided by the fact that this action was pending with an auditor's report in the plaintiff's favor at the time when the releases were given. The releases are absolute and unequivocal in their terms, and must be construed according to the language which the parties have seen fit to use. In order to operate as a release of the demands in suit it was not necessary that the parties should have had them in their minds at the time of the execution of the releases if they are embraced by the terms that were used. *Hyde v. Baldwin*, 17 Pick. 303, 307. *Deland v. Amesbury Woollen & Cotton Manuf. Co.* 7 Pick. 244. We see no error in the refusal of the judge to rule as requested.

*Exceptions overruled.*

*D. A. Ellis & S. M. Whelan*, for the plaintiff.

*G. F. Ordway*, for the defendant.



TIMOTHY MCCARTHY vs. STREET COMMISSIONERS OF THE  
CITY OF BOSTON.

Suffolk. November 18, 1904. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Mandamus.* Way, Construction of highways.

A petition for a writ of mandamus is the proper remedy to compel a city to proceed with the construction of a street alleged to have been unreasonably delayed after having been begun, but the issuing of the writ is a matter of judicial discretion. It was assumed in this case, without deciding it, that a city also could be compelled by mandamus to discontinue a street, but here no such situation was disclosed as required the court to compel the city to proceed with the construction of the street in question or to discontinue it.

MORTON, J. This is a petition for a writ of mandamus by the owner of land on Pontiac Street in Boston to compel the mayor, the board of street commissioners, and the superintendent of streets to proceed forthwith to construct Pontiac Street or, in the alternative, to compel its discontinuance. The case was heard by a single justice who found the facts, and it comes here on a report and reservation by him "as to what order shall be made in the premises."

From the facts found it appears that Pontiac Street was laid out in November, 1899, in part at least over a private way or road called McCarthy Place, built by the petitioner at his own expense to open up his rear land. The work of construction was begun and then suspended, and nothing has been done since November, 1900. There is no intention of resuming the work at present, but the construction of the street has not been abandoned and it is the intention to construct it at some future time. It further appears and is so found "that many streets laid out before, as well as since, Pontiac Street have not been constructed; that to construct them all would cost at least \$700,000 more than the amounts appropriated for street construction, and would require borrowing money to an amount exceeding the debt limit; that in this state of things there has been no attempt to construct all such streets that have been laid out; that some streets laid out since this one have been constructed, and that of the



appropriation there still remains more than enough to construct this street unless it be exhausted by the payment of land damages already awarded for other streets and for money required fully to perform other contracts for street construction in existence and partially carried out." And as to that the presiding justice found "that it would be exhausted by the payment of the sums thus required fully to perform contracts and for said land damages (if all are payable), but it would not be so far exhausted as not to leave enough for the construction of this street by the requirement of the contracts simply, and it did not appear what portion of the land damages were yet payable." It is further found that it is the intention to construct other streets, so that no part of the appropriation will be available for or used for this street. There is nothing to show that the use of the petitioner's land or of McCarthy Place has been or is substantially obstructed by the work done or the condition in which the street has been left. The damages caused to the petitioner by the laying out of the street have been assessed under proceedings instituted by him in November, 1900. The expense of constructing the street will be large and the law under which the street was laid out has since been declared unconstitutional so far as relates to betterment assessments so that the city has not had the benefit of the funds which it presumably thus expected to receive.

The respondents concede that, when a way is laid out, the public authorities required by law to build it are bound to construct it within a reasonable time, and they do not contend that mandamus will not lie at the instance of an abutter, in a proper case, to compel the performance of this duty. It seems to have been assumed without question that it would in *Como v. Worcester*, 177 Mass. 543, *Metcalf v. Mayor & City Council of Boston*, 158 Mass. 284, *Cambridge v. County Commissioners*, 125 Mass. 529, and in *Richards v. County Commissioners*, 120 Mass. 401, the writ was ordered to issue on the petition of eight inhabitants of the town of Attleborough that the county commissioners be required to construct a street which had been located anew, but which the town had refused to complete under the commissioners' order. It does not appear from the published report of the case whether the petitioners were abutters or not, although it



perhaps may be inferred from the statement in the opinion, that the expense could be assessed upon the petitioners or upon the town or county, that they were. Although originally a prerogative writ, a petition for a writ of mandamus may now be brought by any one having a private right, for the enforcement of which the law provides no other adequate and effectual remedy, and where there would otherwise be a failure of justice. See *Selectmen of Gardner v. Templeton Street Railway*, 184 Mass. 294, 297. And it has been held by the Supreme Court of the United States in *Union Pacific Railroad v. Hall*, 91 U. S. 843, 854 *et seq.*, that it can be sued out by a private person to enforce the performance of a public duty, contrary to a dictum by Chief Justice Shaw in *Wellington, petitioner*, 16 Pick. 87, 105. In this State the petition for a writ of mandamus has been assimilated by provisions in regard to indorsement, costs and the recovery of damages, to original writs and other processes issuing as of right. R. L. c. 173, § 39; c. 192, § 5. In the present case the petitioner has no other adequate and effectual remedy, and unless he can bring a petition for a writ of mandamus there would or might be a failure of justice. We think that the petition is properly brought by him. The issuing of the writ, however, is not a matter of right, but of sound judicial discretion. *Murray v. Stevens*, 110 Mass. 95. *Hill v. County Commissioners*, 4 Gray, 414. The ground on which the petitioner asks for the issue of the writ is the delay that has occurred in the construction of the street, the further delay which will take place unless the writ issues, and the loss to which presumably he will be and has been subjected by the delay in not being able to open up and develop his land. We have been referred to no statute and we know of none which requires streets to be constructed within a stated time after they are laid out. There is a provision that the laying out shall be void as against the owner unless possession is taken for the purpose of constructing the way within two years after the right to take possession accrues. R. L. c. 48, § 92. Pub. Sts. c. 49, § 88. But this does not require the way to be completed within two years, but only that entry shall be made on some part of it within that time for the purpose of constructing it. That has been done in this case. In the absence of any statute fixing the time within which a street shall be



constructed after it is laid out and has been begun, the most that an abutter can claim is that it should be built within a reasonable time or abandoned. The question then is whether, taking all of the circumstances into account, it can be said as matter of law that there has been unreasonable delay in building this street, and we are of opinion that it cannot. It is to be presumed that the public authorities have acted and will continue to act in good faith. The delay may be accounted for, in part at least, by the disarrangement in the plans of the authorities which naturally would be caused by having the law under which betterment assessments had been laid declared unconstitutional. There is nothing to show that there is any urgent public necessity for the immediate completion of the street. Its importance as compared with other streets that have been laid out does not appear. Much must necessarily be left to the judgment and discretion of the authorities as to the order in which streets shall be built after they have been laid out, and the time within which they shall be completed after their construction has been begun. Circumstances may arise which could not be foreseen but which must be taken into account. The financial question is or may be an important one. In the present case, it is found that to build all of the streets that have been laid out would cost at least \$700,000, or more than the amounts appropriated for street construction, and would require the borrowing of money in excess of the debt limit. It is found also, as already observed, that it is the intention to construct the street at some time in the future. The petitioner has not been and is not substantially obstructed in the use of his land or of McCarthy Place by the work that has been done. His damages for the laying out have been assessed, and for aught that appears the city has paid them or is liable therefor. No such situation is disclosed, it seems to us, as requires that the city should be compelled to proceed with the construction of the street or discontinue it (assuming without deciding that the city could be compelled by mandamus to discontinue a street) and thereby lose all that it has done and all that it has paid or will be obliged to pay. See *Boston Water Power Co. v. Mayor & City Council of Boston*, 143 Mass. 546.

*Petition dismissed with costs.*

*W. R. Sears & A. Lincoln*, for the petitioner.

*S. H. Hudson*, for the respondents.



DANIEL J. MCCORMACK vs. BOSTON ELEVATED RAILWAY  
COMPANY & another.

Suffolk. January 10, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, On highway.*

If the driver of a tank wagon, drawn by three horses abreast and containing oil, places his team between the track of a street railway company and the sidewalk of a street in order to deliver oil to a varnish factory by a hose pipe across the sidewalk, and if he unfastens the outer trace of the horse nearest the track, and then temporarily leaves his horses and goes back about sixty feet to the office of the varnish factory, he can be found to be negligent and his employer to be liable to a passenger on the running board of an open electric car who is crushed between the car and the hind quarters of the horse as the car is passing the team in the direction in which the horses are facing.

The right to place a team between the track of a street railway company and the curbstone of a street and to keep it there for a reasonable time for the purpose of unloading merchandise must be exercised with a due regard to the rights of others lawfully using the street.

MORTON, J. This is an action of tort for negligence against the Boston Elevated Railway Company and the Standard Oil Company of New York. There was a verdict for the railway company and against the Standard Oil Company, and the case is here on exceptions by the latter company to the refusal of the judge to rule as requested.

A driver of the Standard Oil Company had placed a tank wagon with three horses abreast between the northerly or in-bound track of the railway company and the curbing on the northerly side of Arlington Avenue in Charlestown, and was about to deliver oil by means of a hose pipe running from the rear end of the tank across the sidewalk. The horses and wagon faced in the same direction in which the cars on the northerly or in-bound track were going. The plaintiff was a passenger on an in-bound car, and while standing on the running board was crushed between one of the horses and the car as the car was passing the horses. The hub was the nearest part of the wagon to the rail, and the distance between it and the running board of a passing car was fourteen inches. There was contradictory evidence as to the position of the horses, some witnesses testifying that all three of the horses were in



the street between the curbing and the track, and others that one of the horses was upon the sidewalk. The outside trace of the horse standing nearest to the track had been attached to the whiffletree by means of a trace chain. When the wagon had been placed in position for delivering the oil the driver unfastened this trace and allowed it to hang loose suspended by a lazy strap which kept it from the ground and used the trace chain to lock the whiffletree to the nigh front wheel, and the trace and chain were in this position at the time of the accident. There was testimony tending to show that as the car was passing by, the horse "sheered" or moved toward the car and the plaintiff was crushed between the car and the hind quarters of the horse. There was also testimony tending to show that at the time the driver was about sixty feet back from the team running towards the office of the varnish factory where the oil was to be delivered.

We think that there was evidence of negligence on the part of the driver, and therefore that the first instruction requested, that there was no evidence of negligence on the part of the Standard Oil Company, was rightly refused. It was a question for the jury whether taking all of the circumstances into account the driver was or was not in the exercise of due care in leaving the horse standing so near to passing cars with the trace unfastened, and whether he was justified in leaving him even temporarily in that position while he went to the office of the varnish factory. It could not be ruled as matter of law that there was no evidence of negligence.

The request that the jury be instructed that the "Standard Oil Company . . . had a right to place and keep its team in the position described for the time described for the purpose of unloading its merchandise," was properly refused. The right was, as the judge instructed the jury, to be exercised with due regard to the rights of others having the right to use the street. If given in the form in which it was asked, without explanation or qualification, the instruction would have been misleading. The instructions that were given were correct.

*Exceptions overruled.*

*W. A. Munroe & A. M. Chandler*, for the Standard Oil Company of New York.

*J. J. Irwin*, for the plaintiff.



CHARLES A. DALIN, administrator, vs. WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

CHARLES A. DALIN vs. SAME.

Worcester. January 12, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Landlord and Tenant. License.*

If the proprietor of a tenement house, who owns an adjoining building with a flat roof a portion of which is fenced off and floored with wooden boards and is used by the tenants as a place for drying clothes and for children to play, temporarily removes a part of the fence for the purpose of repairing the roof outside of the enclosure, and if a child six years of age after playing with other children on the roof falls through a skylight beyond the enclosure, the proprietor is not liable for the injuries suffered by the child, who is a trespasser or at most a mere licensee, the proprietor owing him only the duty not to injure him wantonly or to set a trap for him.

MORTON, J. These are two actions of tort founded on alleged negligence on the part of the defendant. The first is an action by the plaintiff as administrator of his son, a boy of six years and two months, to recover for personal injuries, and the second is an action by the father to recover for loss of services and medical and funeral expenses. At the close of the plaintiff's evidence the judge, on the defendant's motion, directed a verdict for it in each case. The cases are here on exceptions by the plaintiff to this ruling.

The defendant owned a five tenement block in Worcester. It had a car barn extending along one side of and in the rear of the block. The roof of the barn was covered with gravel, and a portion of it was floored with wooden boards and enclosed with a picket fence. Children of the families living on the second and third floors played in this enclosure, which was also used by the tenants in the second story as a place for drying clothes. There was also within the enclosure a garbage chute, used by all of the tenants of the building, and a flight of stairs leading to a passageway which led to the street, which likewise was used by



the tenants. The passageway was roofed over and lighted in part by a skylight outside of the enclosure. The accident occurred on June 17, 1901, and was occasioned by the child's falling through this skylight. In April, the end of the fence adjoining the garbage chute, and a portion of the back of the fence had been removed by the defendant in connection with repairs on the roof of the barn and had not been replaced at the time of the accident. There was testimony tending to show that after the fence was thus removed, children played on the roof outside of the enclosure, and had been seen by employees of the defendant and had been ordered by the superintendent to keep off. On June 17, the boy's mother was employed to wash for her sister who occupied the entire third floor, and, with the consent and at the invitation of the sister, the boy's mother arranged to have the boy spend the day with her at her sister's. During the afternoon the boy played with other children in the tenement and also on the roof, the mother looking after him at frequent intervals. Shortly before supper she called to him to come in. He did not obey, and shortly after she went to call him again and found him sitting on the skylight. She called him and watched him till he went around the corner by the garbage chute. After she returned to the kitchen the boy went back to the skylight, and fell through the glass and received injuries from which twenty-one days later he died.

We assume that the defendant owed the same duty to the deceased that it owed to the tenants of the building and the members of their families. *Wilcox v. Zane*, 167 Mass. 302. But it is plain that the roof of the barn outside of the enclosure was not intended to be used by the tenants of the block, and we think that the removal of the fence in connection with the repair of the roof did not constitute an invitation or permission to them to use it. At most the boy was a mere licensee and the defendant owed him no duty except to refrain from wanton injury or from setting a trap for him. *McCoy v. Walsh*, 186 Mass. 369. *Sullivan v. Boston & Albany Railroad*, 156 Mass. 378. *Wright v. Boston & Albany Railroad*, 142 Mass. 296. The fact that children were seen playing upon the roof by employees of the defendant did not constitute an invitation or permission



from the defendant, especially when taken in connection with the further fact that they had been ordered to keep off by the superintendent.

*Exceptions overruled.*

*G. Calkins*, for the plaintiff.

*C. C. Milton*, for the defendant.

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MARGARET M. O'NEIL vs. EDWIN GINN & others.

Middlesex. January 12, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Negligence, Employer's liability.*

In an action by a girl employed in a bindery, against her employer, for having the fingers of her left hand cut off by the dull blade of a folding machine coming down upon them after she had stopped the machine and was straightening out a leaf of paper below the blade, it appeared, that the machine previously had been out of order and that the plaintiff had notified the superintendent, who had examined it and said that it was all right, that a few days before the accident the machine had started from a dead stop, and that the plaintiff had called the machinist's attention to it and he had "fixed it." On cross-examination the plaintiff testified that she could have straightened out the top leaf of paper without putting her hand under the blade. *Held*, that the evidence warranted the jury in finding that the machine was defective, that it had not been repaired properly and that the accident was caused by such want of proper repair. *Held, also*, that the jury could find that the plaintiff was in the exercise of due care in putting her hand under the blade to straighten out the leaf after she had stopped the machine, as after the machine had been repaired by the machinist she had no reason to apprehend that it would start of itself; *also*, that she did not assume the risk of the machine starting of itself.

MORTON, J. This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendants. There was a verdict for the plaintiff, and the case is here on exceptions by the defendants to the refusal of the judge to rule that on all of the evidence the plaintiff was not entitled to recover.

The plaintiff had worked for the defendants five years in their bindery at East Cambridge. About three weeks before the accident she was put to work, in the line of promotion, on a



folding machine designed to fold the leaves of blank books before they are fastened together. The machine had a dull blade operated by a cam. The blade ascended and descended continuously when the machine was in operation. The leaves were pushed under the blade against side and rear gauges, and as the blade descended it would make a crease in them and send them through a slot in the table in a folded form into a basket below. Power was transmitted to the machine by means of a belt from a counter shaft on the ceiling to a tight and loose pulley on the machine. The machine was started and stopped by shifting the belt from the loose pulley to the tight pulley and *vice versa*, and this was done by a belt shifter. The plaintiff had stopped the machine, and had put some leaves under the machine to be folded, when she noticed that the top leaf had slipped. She used her left hand to straighten out the leaf, when the blade came down and cut off her fingers. The defendants contend that there was no evidence of negligence on their part and that the plaintiff was not in the exercise of due care. The plaintiff testified that the second week that she worked on the machine the blade would not come down while the machine was in operation; that she notified the superintendent, and he told her to go to the machinist, which she did, and after he examined it he said it was all right. She also testified that the machine started from a dead stop a few days before the accident and that she "called the machinist's attention to it and he fixed it." We think that this testimony, taken in connection with her testimony as to the manner in which the accident happened, warranted the jury in finding that the machine was defective and that it had not been properly repaired, and that the accident was caused by such want of proper repair. See *Donahue v. Drown*, 154 Mass. 21, *Mooney v. Connecticut River Lumber Co.* 154 Mass. 407; *Myers v. Hudson Iron Co.* 150 Mass. 125, 136; *Packer v. Thomson-Houston Electric Co.* 175 Mass. 496; *Lynch v. Stevens & Sons Co.* 187 Mass. 397; *Gregory v. American Thread Co.* 187 Mass. 239. The case differs from *Ross v. Pearson Cordage Co.* 164 Mass. 257, *Kenneson v. West End Street Railway*, 168 Mass. 1, and *Allen v. Smith Iron Co.* 160 Mass. 557, relied on by the defendants. There was evidence in this case, as already observed, which there was not in those, from which the jury were warranted in



finding that the machine was defective, and that it had not been properly repaired. The defendants further contend that as the plaintiff testified on cross-examination that she could have fixed the top sheet without putting her hand under the blade, she was not in the exercise of due care in putting her hand there. But the machine was stopped, and after having been fixed by the machinist she had no reason to apprehend that it would start of itself. Under such circumstances it cannot be ruled as matter of law that she was not in the exercise of due care in putting her hand under the blade to straighten out the leaf, or that she assumed the risk. See *Connors v. Durite Manuf. Co.* 156 Mass. 163.

*Exceptions overruled.*

*W. T. Atwood*, for the defendants.

*H. N. Allen*, for the plaintiff.

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#### COMMONWEALTH vs. BOSTON ADVERTISING COMPANY.

Suffolk.    January 16, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Metropolitan Park Commission.    Parks and Parkways.*

Under St. 1903, c. 158, § 1, authorizing the metropolitan park commissioners to "make such reasonable rules and regulations respecting the display of signs, posters or advertisements in or near to and visible from public parks and parkways entrusted to their care, as they may deem necessary for preserving the objects for which such parks and parkways are established and maintained," a rule forbidding the maintenance of business signs so near a parkway in the care of the commissioners as to be plainly visible to the naked eye of persons in the parkway, is not a reasonable regulation, being contrary to the provisions of the Constitution in taking property for a public use without providing compensation.

COMPLAINT, received and sworn to in the Police Court of Chelsea on August 10, 1904, against a corporation organized under the laws of this Commonwealth, for violation of a rule of the metropolitan park commission as stated in the opinion.

The complaint having been entered in the Superior Court, the



case came on to be heard before *Sherman, J.* upon an agreed statement of facts. The defendant requested the following rulings: 1. The regulation of the metropolitan park commission, the violation of which is alleged in this complaint, is not authorized by the provisions of St. 1903, c. 158, and therefore is void. 2. The regulation of the metropolitan park commission, the violation of which is alleged in this complaint, is unreasonable and of no legal effect. 3. The rules and regulations of the metropolitan park commission, the violation of which is alleged in this complaint, and the statute purporting to authorize the same, are unconstitutional and void. 4. On the agreed facts, the sign in question cannot as a matter of law be said to be "near to" the parkway, within the meaning of St. 1903, c. 158. 5. On all the agreed facts the defendant is not guilty.

The defendant's counsel stated that if the judge declined to make the rulings requested, the defendant would consent to a verdict of "guilty." The judge refused all of the requests, and a verdict of "guilty" was taken with the consent of the counsel for the defendant, the defendant excepting to the refusal to rule as requested. At the request of the district attorney and of the counsel for the defendant, the judge reported the case for determination by this court. If the rulings were correct, the verdict was to stand; otherwise, a new trial was to be granted, and judgment was to be entered for the defendant, or such judgment was to be entered as law and justice might require.

The case was argued at the bar in January, 1905, before *Knowlton, C. J., Morton, Lathrop, Loring, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth, submitted a brief.

*J. H. Soliday*, for the defendant.

**BARKER, J.** The complaint upon which the defendant was found guilty was for a violation of the rules and regulations made by the metropolitan park commission under St. 1903, c. 158. The act charged was maintaining a business sign on land near enough to the Revere Beach parkway to render the words of the sign plainly visible to the naked eye of persons in the parkway.

It appears that the sign was an advertisement of a household



utensil. The sign board was forty feet in width and seven and one half feet high, with black letters on an orange ground. The capital letters were three feet three and one half inches high and two feet ten inches wide. It is not contended that the sign was indecent or immoral, or of a nature to frighten man or beast, or in any way to cause bodily injury by falling or being blown against persons or vehicles using the way.

The defendant is in the advertising business. It had purchased from the owner of the land the right to maintain the sign until October 1, 1905, and had been paid to keep up the advertisement until December 30, 1904. Its contract with the owner of the land began on October 29, 1903, and its contract to maintain the sign was made in September, 1903.

The parkway was established in 1899. The rule or regulation charged to have been broken by maintaining the sign was established on August 20, 1903. The same sign had been in the same location before the establishment of the parkway, and ever since.

The rule or regulation forbids the erection, maintaining or display upon any land, or the outside of any building, of any commercial or business sign, poster or advertisement, within such distance of any public park or parkway in care of the commission as shall render the words, figures or devices of the sign, poster or advertisement plainly visible to the naked eye within the park or parkway, without the written permission of the commission; save that the rule is not to be construed to prevent the owner or occupant of land, building or tenement from displaying or maintaining thereon one sign or advertisement for business or commercial purposes, in size not larger than fifteen inches by twenty feet, and relating exclusively to the property on which it may be placed, or to the business thereon conducted, or to the person conducting the same.

The statute provides that the commission and also the officers having charge of public parks and parkways, "may make such reasonable rules and regulations respecting the display of signs, posters or advertisements in or near to and visible from public parks and parkways entrusted to their care, as they may deem necessary for preserving the objects for which such parks and parkways are established and maintained." St. 1903, c. 158, § 1.



The counsel for the prosecution asserts that public parks and parkways are created and maintained to contribute to the health and pleasure of the community. It has been said that they "are established for the use and enjoyment of the people while seeking pleasure and recreation, as well as at other times." No doubt the principal and controlling object for which public parks and parkways are established is that of pleasure. They are distinctively and chiefly pleasure grounds. So far as they incidentally serve to promote health by affording the means of being in the open air and the sunlight, or of taking healthful exercise, the presence or absence of signs upon neighboring lands is immaterial.

We think therefore that the well being of the ordinary person who uses a public park or parkway never can be so far affected by the visibility of signs, posters or advertisements placed on other ground as to injure his health. No doubt their presence there may hide from him fine views, or may turn into a disagreeable *ensemble* what otherwise would be a pleasing outlook, or the sign or poster or advertisement may be itself ugly, or, if not so, may be displeasing because of incongruity. At most the presence of signs, posters and advertisements upon lands or buildings near a public park or parkway is an offence against good taste, and in that way alone detracts from the pleasure only of the frequenters of such places.

We agree that the promotion of the pleasure of the people is a public purpose for which public money may be used and taxes laid, even if the pleasure is secured merely by delighting one of the senses. *Higginson v. Nahant*, 11 Allen, 530. *Hubbard v. Taunton*, 140 Mass. 467. *Attorney General v. Williams*, 174 Mass. 476, 479, 480. The question here is not of the power of the State to expend money or to lay taxes to promote æsthetic ends, or to regulate the use of property with a view to promote such ends. It is of the right of the State by such regulations to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner.

Probably no one would care at present to deny that without compensation "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the



governing authority of the country essential to the safety, health, peace, good order and morals of the community." Field, J. in *Crowley v. Christensen*, 137 U. S. 86, 89. Beyond the purposes named there are many others of a public nature, the promotion of which may involve the taking or damaging of the property of individuals, and as to which there well may be differences of opinion as to whether the State must afford compensation if such loss or damage is inflicted.

One of them is the education of youth. Probably all will agree that judged by any fair standard the promotion of education stands upon a higher plane than the promotion of æsthetic culture or enjoyment, and would the better justify the imposition of a burden without compensation. But no one would contend that the State could authorize the taking of land for a schoolhouse without providing compensation for the owner. In a very recent case this court in dealing with a statute requiring street railway companies to transport school children at reduced rates of fare has held that if it appeared that the enforcement of the act would cause expense which the carrier must bear or put upon other patrons, we should be obliged to hold that there was a taking of property without due process of law. *Commonwealth v. Interstate Consolidated Street Railway*, 187 Mass. 436. If the police power technically so called will not justify a taking of property without compensation to promote the education of youth, it cannot justify such a taking for the promotion of merely æsthetic purposes.

Therefore if the rules of the commission amount to a taking of property, as no compensation is provided they cannot be held valid. The plain and intended purpose of the rule is to prohibit the use of land near public parks and parkways for advertising. This has come to be an ordinary and remunerative use of lands near largely travelled streets, parkways, public parks, railroads and other places frequented in numbers by the public. It is as natural a use of such lands as is the use of store fronts and show windows for the display of goods kept for sale, or for other modes of advertising. It resembles the placing of advertising pages on each side of the literary portion of a periodical or the placing in street cars or railway stations of advertisements disconnected with the business of transportation. All these at



present are usual, common and profitable uses of property, of which every one sees daily numerous instances.

In the opinion of a majority of the court the rules or regulations established by the commission so interfere with the use of property as to amount to a taking of property for public use, and, as no compensation is provided for, the rules are void, because obnoxious to the provisions of our Constitution. Declaration of Rights, art. 10. They are not reasonable within the meaning of St. 1903, c. 158, § 1.

We do not hold that no valid rules as to signs, posters or advertisements on land near to public parks or parkways can be made under St. 1903, c. 158.

Rules intended to prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the public, no doubt would be reasonable within the meaning of the statute and valid.

We think the case of *Rochester v. West*, 164 N. Y. 510, was decided and can rest only on this ground. See *Gunning System v. Buffalo*, 75 App. Div. (N. Y.) 31; *People v. Green*, 85 App. Div. (N. Y.) 400.

*Verdict set aside ; judgment to be entered for the defendant.*



**MICHAEL T. BERRY vs. JERRY E. DONOVAN.**

Essex. March 10, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Malicious Interference. Actionable Tort. Labor Union. Boycotting.*

Inducing an employer to discharge a workman because he does not belong to a certain labor union is actionable in tort as an unjustifiable interference with a contract.

If a manufacturer makes an agreement with a labor union that he will not retain any worker in his employ after receiving notice from the union that such worker is objectionable to the union for any cause, whatever rights this agreement may give the contracting parties in relation to each other, it does not justify an agent of the union in demanding and procuring the discharge of a



workman by the manufacturer because the workman is not a member of the union, and if he does so he is liable to the workman in damages.

It is no defence to an action of tort for maliciously causing the discharge of the plaintiff by his employer that the plaintiff's employment was terminable at the will of his employer, that fact being material only upon the question of damages.

KNOWLTON, C. J. This is an action of tort brought to recover damages sustained by reason of the defendant's malicious interference with the plaintiff's contract of employment. The plaintiff was a shoemaker, employed by the firm of Hazen B. Goodrich and Company at Haverhill, Massachusetts, under a contract terminable at will. At the time of the interference complained of he had been so employed nearly four years. The defendant was the representative at Haverhill of a national organization of shoe workers, called the Boot and Shoe Workers' Union, of which he was also a member. The evidence showed that he induced Goodrich and Company to discharge the plaintiff, greatly to his damage. A few days before the plaintiff's discharge, a contract was entered into between the Boot and Shoe Workers' Union and the firm of Goodrich and Company, which was signed by the defendant for the union, the second clause of which was as follows: "In consideration of the foregoing valuable privileges, the employer agrees to hire as shoe workers, only members of the Boot and Shoe Workers' Union, in good standing, and further agrees not to retain any shoe worker in his employment after receiving notice from the union that such shoe worker is objectionable to the union, either on account of being in arrears for dues, or disobedience of union rules or laws, or from any other cause." The contract contained various other provisions in regard to the employment of members of the union by the firm, and the rights of the firm and of the union in reference to the services of these employees, and the use of the union's stamp upon goods to be manufactured.

The plaintiff was not a member of this union. Soon after the execution of this contract, the defendant demanded of Goodrich and Company that the plaintiff be discharged, and the evidence tended to show that the sole ground for the demand was that the plaintiff was not a member of the union, and that he persistently declined to join it, after repeated suggestions that he should do so.



At the close of the evidence the defendant asked for the following instructions which the judge declined to give:

"1. Upon all the evidence in the case, the plaintiff is not entitled to recover.

"2. Upon all the evidence in the case, the defendant was acting as the legal representative of the Boot and Shoe Workers' Union and not in his personal capacity, and therefore the plaintiff cannot recover.

"3. The contract between the Boot and Shoe Workers' Union and Hazen B. Goodrich and Company was a valid contract, and the defendant, as the legal representative of the Boot and Shoe Workers' Union, had a right to call the attention of Hazen B. Goodrich and Company, or any member of the firm, to the fact that they were violating the terms of the contract in keeping the plaintiff in their employment after the contract was signed, and insisting upon an observance of the terms of the contract, even if the defendant knew that the observance of the terms of the contract would result in the discharge of the plaintiff from their employment.

"4. The contract referred to was a legal contract, and a justification of the acts of the defendant, as shown by the evidence in this case."

"6. The defendant cannot be held responsible in this action, unless it appears that the defendant used threats, or some act of intimidation, or some slanderous statements, or some unlawful coercion to or against the employers of the plaintiff, to thereby cause the plaintiff's discharge; and upon all the evidence in the case there is no such evidence, and the plaintiff cannot recover."

The defendant excepted to the refusal, and to the portions of the charge which were inconsistent with the instructions requested. The jury returned a verdict of \$1,500 for the plaintiff. These exceptions present the only questions which were argued before us by the defendant.

The primary right of the plaintiff to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. The right to dispose of one's labor as he will, and to have the benefit of one's lawful contract, is incident to the freedom of the individual, which lies at the foundation of the government in all countries that maintain the



principles of civil liberty. Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such a right, without lawful justification, is malicious in law, even if it is from good motives and without express malice. *Walker v. Cronin*, 107 Mass. 555, 562. *Plant v. Woods*, 176 Mass. 492, 498. *Allen v. Flood*, [1898] A. C. 1, 18. *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613. *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88, 96. *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600, 617.

In the present case the judge submitted to the jury, first, the question whether the defendant interfered with the plaintiff's rights under his contract with Goodrich and Company, and secondly, the question whether, if he did, the interference was without justifiable cause. The jury were instructed that, unless the defendant's interference directly caused the termination of the plaintiff's employment, there could be no recovery. The substance of the defendant's contention was, that if he acted under the contract between the Boot and Shoe Workers' Union and the employer in procuring the plaintiff's discharge, his interference was lawful.

This contention brings us to an examination of the contract. That part which relates to the persons to be employed contains, first, a provision that the employer will hire only members of the union. This has no application to the plaintiff's case, for it is an agreement only for the future, and the plaintiff had been hired a long time before. The next provision is, that the employer will not retain in his employment a worker, after receiving notice that he is objectionable to the union, "either on account of being in arrears for dues, or disobedience of union rules or laws, or from any other cause." The first two possible causes for objection could not be applied to persons in the situation of the plaintiff, who were not members of the union or amenable to its laws. As to such persons, the only provision applicable was that the firm would not retain a worker who was objectionable to the union from any cause, however arbitrary the objection, or unreasonable the cause might be. This provision purported to authorize the union to interfere and deprive



any workman of his employment for no reason whatever, in the arbitrary exercise of its power. Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment, by a third person who made the contract with his employer. *Curran v. Galen*, 152 N. Y. 38. No one can legally interfere with the employment of another, unless in the exercise of some right of his own, which the law respects. His will so to interfere for his own gratification is not such a right.

The judge rightly left to the jury the question whether, in view of all the circumstances, the interference was or was not for a justifiable cause. If the plaintiff's habits, or conduct, or character had been such as to render him an unfit associate, in the shop, for ordinary workmen of good character, that would have been a sufficient reason for interference in behalf of his shopmates. We can conceive of other good reasons. But the evidence tended to show that the only reason for procuring his discharge was his refusal to join the union. The question, therefore, is whether the jury might find that such an interference was unlawful.

The only argument that we have heard in support of interference by labor unions, in cases of this kind, is that it is justifiable as a kind of competition. It is true that fair competition in business brings persons into rivalry, and often justifies action for one's self, which interferes with proper action of another. Such action, on both sides, is the exercise by competing persons of equal conflicting rights. The principle appealed to would justify a member of the union, who was seeking employment for himself, in making an offer to serve on such terms as would result, and as he knew would result, in the discharge of the plaintiff by his employer, to make a place for the new comer. Such an offer, for such a purpose, would be unobjectionable. It would be merely the exercise of a personal right, equal in importance to the plaintiff's right. But an interference by a combination of persons, to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition. In such a case the action taken by



the combination is not in the regular course of their business as employees, either in the service in which they are engaged, or in an effort to obtain employment in other service. The result which they seek to obtain cannot come directly from anything that they do within the regular line of their business as workers competing in the labor market. It can come only from action outside of the province of workmen, intended directly to injure another, for the purpose of compelling him to submit to their dictation.

It is difficult to see how the object to be gained can come within the field of fair competition. If we consider it in reference to the right of employees to compete with one another, inducing a person to join a union has no tendency to aid them in such competition. Indeed the object of organizations of this kind is not to make competition of employees with one another more easy or successful. It is rather, by association, to prevent such competition, to bring all to equality, and to make them act together in a common interest. Plainly then, interference with one working under a contract, with a view to compel him to join a union, cannot be justified as a part of the competition of workmen with one another.

We understand that the attempted justification rests entirely upon another kind of so called competition, namely, competition between employers and the employed, in the attempt of each class to obtain as large a share as possible of the income from their combined efforts in the industrial field. In a strict sense, this is hardly competition. It is a struggle or contention of interests of different kinds, which are in opposition, so far as the division of profits is concerned. In a broad sense, perhaps the contending forces may be called competitors. At all events, we may assume that, as between themselves, the principle which warrants competition permits also reasonable efforts, of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other. But when action is directed against the other, primarily for the purpose of doing him harm and thus compelling him to yield to the demand of the actor, and this action does not directly affect the



property, or business, or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act.

The gain which a labor union may expect to derive from inducing others to join it, is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it. If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands, or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly. A monopoly, controlling anything which the world must have, is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly. It therefore does not justify causing the discharge, by his employer, of an individual laborer working under a contract. It is easy to see that, for different reasons, an act which might be done in legitimate competition by one, or two, or three persons, each proceeding independently, might take on an entirely different character, both in its nature and its purpose, if done by hundreds in combination.

We have no desire to put obstacles in the way of employees, who are seeking by combination to obtain better conditions for themselves and their families. We have no doubt that laboring men have derived and may hereafter derive advantages from organization. We only say that, under correct rules of law, and with a proper regard for the rights of individuals, labor unions cannot be permitted to drive men out of employment because they choose to work independently. If disagreements between those who furnish the capital and those who perform the labor



employed in industrial enterprises are to be settled only by industrial wars, it would give a great advantage to combinations of employees, if they could be permitted, by force, to obtain a monopoly of the labor market. But we are hopeful that this kind of warfare soon will give way to industrial peace, and that rational methods of settling such controversies will be adopted universally.

The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time, does not affect his right to recover. It only affects the amount that he is to receive as damages. *Moran v. Dunphy*, 177 Mass. 485, 487. *Perkins v. Pendleton*, 90 Maine, 166, 176. *Lucke v. Clothing Cutters & Trimmers' Assembly*, 77 Md. 896. *London Guarantee & Accident Co. v. Horn*, 101 Ill. App. 355; *S. C.* 206 Ill. 493.

The conclusion which we have reached is well supported by authority. The principle invoked is precisely the same as that which lies at the foundation of the decision in *Plant v. Woods*, 176 Mass. 492. In that case, although the power that lies in combination and the methods often adopted by labor unions in the exercise of it were stated with great clearness and ability, the turning point of the decision is found in this statement on page 502: "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition." *Carew v. Rutherford*, 106 Mass. 1. *Walker v. Cronin*, 107 Mass. 555, and the other cases cited in *Plant v. Woods*, *ubi supra*, as well as the later case of *Martell v. White*, 185 Mass. 255, all tend to support us in our decision.

We long have had a statute forbidding the coercion or compulsion by any person of any other "person into a written or verbal agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person." R. L. c. 106, § 12. The same principle would justify a prohibition of the coercion or compulsion of a person into a written or verbal agreement to join such an organization, as a condition of his securing employment, or continuing in the employment of another person.



The latest English cases, which explain and modify *Allen v. Flood*, [1898] A. C. 1, seem in harmony with our conclusion. *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600. *Quinn v. Leathem*, [1901] A. C. 495. In the first of these it was held that a labor union could not use its power to deprive one of employment, in order to compel him to pay a debt in which the union was interested. The case of *Curran v. Galen*, 152 N. Y. 33, in the decision of which the judges of the court of appeals were unanimous, fully covers the present case. The principle involved in each of the two cases is the same, and the language of the opinion in that case, in its application to this, is decisive. From the decision of *National Protective Assoc. v. Cumming*, 170 N. Y. 315, three of the seven judges dissented, and the result is to leave the law of New York in some uncertainty. The majority distinguished that case from *Curran v. Galen*, just referred to, and held that their decision was not inconsistent with it. They seem to have treated the arrangement to exclude persons not belonging to the union as entered into for legitimate purposes, having reference to actual or probable conditions in the employment; while the minority treated it as similar to the arrangement that appears in *Curran v. Galen*. See also *Jacobs v. Cohen*, 90 N. Y. Supp. 854; *Mills v. United States Printing Co.* 99 App. Div. (N. Y.) 605.

The law of Illinois is in accord with our conclusion. In *London Guarantee & Accident Co. v. Horn*, 101 Ill. App. 355; *S. C.* 206 Ill. 498, it was held that a refusal of a workman to accede to the request of another in a matter affecting the pecuniary interest of the other would not justify the procurement of his discharge from the employment in which he was engaged, under a contract terminable at will. See also, for kindred doctrines, *Doremus v. Hennessy*, 176 Ill. 608; *Christensen v. People*, 114 Ill. App. 40; *Mathews v. People*, 202 Ill. 389; *Erdman v. Mitchell*, 207 Penn. St. 79; *Perkins v. Pendleton*, 90 Maine, 166. Other cases bearing more or less directly upon the general subject are *Lucke v. Clothing Cutters & Trimmers' Assembly*, 77 Md. 396; *Holder v. Cannon Manuf. Co.* 135 N. C. 392; *Chipley v. Atkinson*, 23 Fla. 206; *Blumenthal v. Shaw*, 77 Fed. Rep. 954; *Barr v. Essex Trades Council*, 8 Dick. 101; *Jersey City Printing Co. v. Cassidy*, 18 Dick. 759; *Crump v. Commonwealth*, 84 Va. 927; *Old*



*Dominion Steamship Co. v. McKenna*, 80 Fed. Rep. 48; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 429; *Bailey v. Master Plumbers*, 103 Tenn. 99; *Dels v. Winfree*, 80 Tex. 400. It will be seen that in the different courts there is considerable variety and some conflict of opinion.

We hold that the defendant was not justified by the contract with Goodrich and Company, or by his relations to the plaintiff, in interfering with the plaintiff's employment under his contract. How far the principles which we adopt would apply, under different conceivable forms of contract, to an interference with a workman not engaged, but seeking employment, or to different methods of boycotting, we have no occasion in this case to decide.

The defendant contends that the judge erred in his instruction to the jury, in response to the defendant's special request at the close of the charge. The judge said, in substance, that if the defendant caused the firm to discharge the plaintiff, by giving the members to understand that, unless they discharged him, they "would be visited with some punishment, under the contract or otherwise, then that interference would not be justifiable." This instruction, taken literally and alone, would be erroneous. Some grounds of interference would be justifiable while others would not. But considering the instruction in connection with that which immediately preceded it, and with other parts of the charge, it is evident that the judge was directing the attention of the jury to what would constitute an interference, not to what would justify an interference. He had just told them that, if all the defendant did was to call the attention of the firm to the provision of the contract, and the firm then, of their own motion, discharged the plaintiff, the defendant would not be liable. He then pursued the subject with some elaboration, and ended as stated above. Instead of saying, "then that interference would not be justifiable," he evidently meant to say, "then that would be interference which would create a liability, unless it was justifiable." Taking the charge as a whole, we think the jury were not misled by the inaccuracy of this statement.

*Exceptions overruled.*

*H. F. Hurlburt*, (*J. J. Ryan* with him,) for the defendant.  
*J. J. Winn*, for the plaintiff.



## DORA GREEN vs. ABRAHAM SKLAR.

Suffolk. March 16, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; HAMMOND, JJ.

*Practice, Civil, Costs. Constitutional Law. Words, "Reduce."*

Under R. L. c. 203, § 9, which provides that when two or more cases are tried together the presiding judge may reduce the witness fees and other costs, but that "not less than the ordinary witness fees and other costs recoverable in one of the cases which are so tried together shall be allowed," the judge in his discretion may reduce the costs in such a way as to leave no costs in some of the cases, if he leaves the aggregate amount not less than the costs recoverable in any one of the cases.

R. L. c. 203, § 9, which, when cases are tried together, gives the presiding judge power in his discretion to reduce the costs in such a way as to leave no costs in some of the cases, is not unconstitutional, as depriving a plaintiff thus losing his costs of the equal protection of the laws, or for any other reason.

KNOWLTON, C. J. The R. L. c. 203, § 9, is as follows: "If two or more cases are tried together in the Supreme Judicial Court, in the Superior Court or in a police, district or municipal court, the presiding judge may reduce the witness fees and other costs; but not less than the ordinary witness fees and other costs recoverable in one of the cases which are so tried together shall be allowed."

This is an action of tort brought by the plaintiff in the Municipal Court for the City of Boston, and, after judgment for the defendant, appealed by the plaintiff to the Superior Court, and there tried with another action against the same defendant, brought by Jacob Green, the husband of the plaintiff. In each action there was a verdict for the plaintiff in the sum of \$1. The costs taxed for the plaintiff in this action are \$40.89, and those taxed for the plaintiff in the other action are \$239.84, of which \$188.75 are for witnesses. The defendant moved for a reduction of costs under the statute. The presiding judge disallowed all costs of the plaintiff in this action; and the plaintiff appealed from the order.

The first question is whether, in applying the statute, the judge may consider the costs of the different cases together as one aggregate, and reduce them to an amount "not less than the



ordinary witness fees and other costs recoverable in one of the cases"; or, whether he is to consider the costs of each case by itself, and make the reduction in each case separately. If he is limited to the latter mode, he cannot extinguish or disallow the costs altogether in any case, for the word "reduce," in its ordinary signification, does not mean to cancel, destroy or bring to naught, but to diminish, lower or bring to an inferior state. We think the words above quoted indicate that, in reducing the costs, the amount in all the cases together is to be considered and reduced. This makes it possible for the judge, in his discretion, to reduce them in such a way as to leave nothing in some of the cases, providing he leaves in the aggregate an amount not less than the largest sum recoverable in any of the cases.

Ordinarily we should expect the reduction to be so made as to leave something to be recovered in each of the cases. But the statute does not compel this. In the present case the judge may have found that the relations of the two plaintiffs to each other as husband and wife were such that no injustice would be done by the order which he made. The record shows no error of law in his decision.

The plaintiff contends that the statute is unconstitutional; but we know of nothing in the Constitution of the Commonwealth, or in the Constitution of the United States, which prevents the Legislature from enacting that, at least in certain classes of cases, the prevailing party to a suit in court shall recover nothing from the other for his costs.

Nor can it be contended successfully that the plaintiff is deprived of the equal protection of the laws. While the statute provides that costs may be reduced when two or more cases are tried together, the law applies to all cases that come within the prescribed class, and it does not make an arbitrary distinction. The classification rests upon a difference which bears a reasonable and just relation to the subject in respect to which the classification is made. See *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 560.

*Order affirmed.*

*E. M. Shanley*, for the plaintiff.

*A. K. Cohen & S. Bamber*, for the defendant.



## CHARLES W. RUDBERG vs. BOWDEN FELTING COMPANY.

Worcester. March 21, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, &amp; BRALEY, JJ.

*Practice, Civil. Negligence, Employer's liability.*

If in an action for personal injuries the presiding judge in his charge to the jury has made certain remarks not pertinent to the case, which if unrecalled might be prejudicial to the defendant, but afterwards in an emphatic way tells the jury to dismiss this part of the charge from their minds and to deal with the case as if the remarks had not been made, it is to be presumed that the jury obeyed the instructions of the judge, and it may be held that justice does not require that a verdict for the plaintiff should be set aside. The same principle may be applied to the admission of incompetent evidence which the jury is told to disregard.

In an action by a boy, less than thirteen years of age when injured, against his employer for injuries from a complicated and dangerous machine, the evidence described in the opinion was held to be sufficient to submit to the jury under instructions which would authorize them to return a verdict for the plaintiff if they found that the defendant failed to give the plaintiff such instructions as were reasonably necessary to enable a boy of his age and intelligence to see and appreciate the nature of the machine and the danger attending his work upon it.

TORT, by a boy born on October 29, 1889, for injuries received on July 7, 1902, in the defendant's mill at Millbury, from his hand being caught in a card machine. Writ dated December 22, 1902.

At the trial in the Superior Court before *Pierce, J.* the jury returned a verdict for the plaintiff in the sum of \$1,691.91; and the defendant alleged exceptions, raising the questions stated by the court.

*C. C. Milton & G. A. Gaskill*, for the defendant.

*E. H. Vaughan, J. A. Thayer & C. B. Perry*, for the plaintiff.

HAMMOND, J. While that portion of the charge which refers to the law with reference to the employment of minors in a factory and to the desire of the presiding judge that it should be properly enforced had nothing whatever to do with the case, and while the remarks on that subject, if unrecalled, might have been regarded as prejudicial to the defendant, still, in view of the very positive and emphatic way in which the jury were



finally told to dismiss this part of the charge from their minds and deal with the case as though the remarks had not been made, and not in "the slightest degree to impute to these defendants any negligence or put any punishment whatsoever upon them, because they have violated, if they have, this law," justice does not seem to us to require that the verdict should be set aside. It is to be presumed that the jury obeyed the emphatic instructions of the judge. And the same may be said of the evidence of the defendant's superintendent as to his knowledge of the law. The jury were told to disregard it.

The case finally was submitted to the jury upon instructions which authorized them to find for the plaintiff if the defendant failed to give him such instructions as were reasonably necessary to enable a boy of his age and intelligence to see and appreciate the nature of the machine and the danger attending his work upon it. The instructions upon this point were full, apt and correct. *Coombs v. New Bedford Cordage Co.* 102 Mass. 572. *O'Connor v. Adams*, 120 Mass. 427. *De Costa v. Hargraves Mills*, 170 Mass. 875.

The evidence upon the extent to which the plaintiff was instructed was conflicting, but it warranted a finding that the machine was complicated and dangerous; that at times it might become clogged with the wool which was going through it, so that the "worker," which was one of the rollers, might rise from the "U shaped socket" in which it was placed, and stop the machine; that the only instruction received by the plaintiff, who was employed to "feed" the machine at one end and remove the carded wool at the other, was to "watch the other boys" who were working on similar machines; that he watched them a few hours and was then set to work upon this machine; that on the third day the "worker" stopped; that he "stood in front of the machine and pushed it with a broomstick"; that while he was doing this Dunn, a foreman, said to him, "What are you doing that for? Don't you know you will break the whole machine? Use your hand next time"; that on the same day the machine stopped two or three times after that, and he started it with his hands; that the last time it stopped he put his hand on the "worker" to pull it toward him; and that "it started with a jump," and his hand was drawn in and injured.



He was not quite thirteen years of age. It appeared that his father worked on razor machinery, and that he had helped his father and knew something about that kind of machinery. As to the machine in question, he testified that he "was never told what was inside this big cylinder and knew nothing of the inside," and that he never saw anything under the rolls.

This state of things would warrant the jury in finding that in view of the complicated nature of the machine, the danger of its clogging and the consequent displacement of the "worker," the care required to put the worker back in its socket and its violent and rapid action in going back, the dangers attending the operation of the machine were not obvious to a child of the age and experience of the plaintiff; and that the defendant negligently omitted to give him such instructions as he needed and should have received. Upon comparing the instructions requested with the charge given, we see no error in the manner in which the presiding judge dealt with them.

*Exceptions overruled.*

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**BENJAMIN BANKS vs. HAMMOND BRAMAN.**

Suffolk. March 24, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Negligence, Gross.*

To establish gross negligence on the part of a defendant, the plaintiff must show intentional conduct of the defendant having a tendency to injure others which is known or ought to be known to the defendant, accompanied by a wanton and reckless disregard of its probable harmful consequences.

Where the liability of a defendant depends upon showing gross negligence it must be explained clearly to the jury that the negligence to be shown is different in kind not merely in degree from a lack of ordinary care.

TORT, for injuries from being struck by an automobile driven by the defendant on Mount Auburn Street in Cambridge near its intersection with Belmont Street shortly after eight o'clock on the evening of May 17, 1903. Writ dated November 18, 1903.

At the trial in the Superior Court before Aiken, C. J. the jury



returned a verdict for the plaintiff in the sum of \$3,750; and the defendant alleged exceptions, raising the questions stated by the court.

*B. D. Hyde*, for the defendant.

*J. L. Hall*, (*D. E. Mook* with him,) for the plaintiff.

KNOWLTON, C. J. This is an action to recover for injuries received from being struck by an automobile alleged to have been negligently run at an excessive rate of speed, and negligently managed by the defendant. The case was submitted to the jury on two alleged grounds of liability: one, that the defendant, with gross negligence, wantonly and recklessly injured the plaintiff, and the other that the plaintiff was in the exercise of due care, and that the injury was due to the defendant's negligence. On the first claim the judge instructed the jury as follows: "Gross negligence is great negligence. To make out the proposition of gross negligence, you must be satisfied that the way the machine was operated by Braman was reckless, was careless to the degree of recklessness; that it was run with a reckless disregard to the rights of Banks in this street. If that is established, namely, that there was a reckless disregard of the rights of Banks in the way this machine was run, then Banks is not required to show that he was himself in the exercise of due care. If the way — I repeat this for the purpose of plainness perhaps unnecessarily — if the manner in which the machine — the automobile, I mean by the machine — was run on the occasion of this accident was such that it was grossly negligent, that is, careless to such a degree that you can say it was reckless, using your common sense and judgment, and applying them to the evidence, then Banks is not required to show that he was in the exercise of due care; because if the defendant's carelessness was gross in the sense that has been defined to you, there is an obligation to pay damages independent of the matter of due care." The defendant excepted to this instruction. The jury were instructed as to the liability for a failure to exercise ordinary care, but there was no fuller statement of the law on this branch of the case.

The question is whether the difference between the two kinds of liability was sufficiently pointed out to give the jury an adequate understanding of it. The difference in culpability of the defendant, which distinguishes these different kinds of liability,



is something more than a mere difference in the degree of inadvertence. In one case there need be nothing more than a lack of ordinary care, which causes an injury to another. In the other case there is wilful, intentional conduct whose tendency to injure is known, or ought to be known, accompanied by a wanton and reckless disregard of the probable harmful consequences from which others are likely to suffer, so that the whole conduct together, is of the nature of a wilful, intentional wrong. The subject was discussed at length in *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 271, and a part of the language used in the opinion is as follows: "It is equally true that one who wilfully and wantonly, in reckless disregard of the rights of others, by a positive act or careless omission exposes another to death or grave bodily injury, is liable for the consequences, even if the other was guilty of negligence or other fault in connection with the causes which led to the injury. The difference in rules applicable to the two classes of cases results from the difference in the nature of the conduct of the wrongdoers in the two kinds of cases. In the first case the wrongdoer is guilty of nothing worse than carelessness. In the last he is guilty of a wilful, intentional wrong. His conduct is criminal or quasi criminal. If it results in the death of the injured person, he is guilty of manslaughter. *Commonwealth v. Pierce*, 138 Mass. 165. *Commonwealth v. Hartwell*, 128 Mass. 415. The law is regardful of human life and personal safety, and if one is grossly and wantonly reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a wilful and intentional wrong. It is no defence to a charge of manslaughter for the defendant to show that, while grossly reckless, he did not actually intend to cause the death of his victim. In these cases of personal injury there is a constructive intention as to the consequences, which, entering into the wilful, intentional act, the law imputes to the offender, and in this way a charge which otherwise would be mere negligence, becomes, by reason of a reckless disregard of probable consequences, a wilful wrong. That this constructive intention to do an injury in such cases will be imputed in the absence of an actual intent to harm a particular person, is recognized as an elementary principle in criminal law. It is also recognized in civil actions



for recklessly and wantonly injuring others by carelessness." In dealing with the same subject in *Bjornquist v. Boston & Albany Railroad*, 185 Mass. 180, 184, the court said: "The conduct which creates a liability to a trespasser in cases of this kind has been referred to in the books in a variety of ways. Sometimes it has been called gross negligence and sometimes wilful negligence. Plainly it is something more than is necessary to constitute the gross negligence referred to in our statutes and in decisions of this court. The term 'wilful negligence' is not a strictly accurate description of the wrong. But wanton and reckless negligence in this class of cases includes something more than ordinary inadvertence. In its essence it is like a wilful, intentional wrong. It is illustrated by an act which otherwise might be unobjectionable, but which is liable or likely to do great harm, and which is done in a wanton and reckless disregard of the probable injurious consequences." The ground on which it is held that, when an act of the defendant shows an injury inflicted in this way, the plaintiff need introduce no affirmative evidence of due care, is that such a wrong is a cause so independent of previous conduct of the plaintiff, which, in a general sense, may fall short of due care, that this previous conduct cannot be considered a directly contributing cause of the injury, and, in reference to such an injury, the plaintiff, without introducing evidence, is assumed to be in a position to claim his rights and to have compensation. So far as the cause of his injury is concerned, he is in the position of one who exercises due care. *Aiken v. Holyoke Street Railway, ubi supra*.

It is not easy to explain to a jury the nature of this liability. What was said by the judge in this case comes very near to a correct statement of the law. But it lacks something in fulness, and we think the jury may have understood that negligence somewhat greater in degree than a mere lack of ordinary care or a simple inadvertence, but not different from it in kind, would constitute the gross negligence referred to. We are of opinion that when there is an attempt to establish this peculiar kind of liability, which exists independently of a general exercise of due care by the plaintiff, the jury should be instructed with such fulness as to enable them to know that they are dealing with a wrong materially different in kind from ordinary negligence.



Because we think the instruction may have left the jury with a misunderstanding of the law, the exceptions are sustained.

We are of opinion that there was evidence which justified the submission of the case to the jury on this ground, as well as on the ground that the plaintiff was in the exercise of due care.

*Exceptions sustained.*

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MARGARET SMITH vs. THOMSON-HOUSTON ELECTRIC COMPANY.

MARGARET SMITH, administratrix, vs. SAME.

Essex. April 4, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Negligence, Employer's liability. Practice, Civil, Verdict, New trial.*

A switchman on a reversible motor car, attached to a flat car loaded with machinery and moulds being transported within the yard of the works of an electrical company, who was thrown under the car and injured owing to the breaking of a board step supported by brackets attached to the side of the car on which he was standing, he having jumped upon it after throwing open a switch and running back in performing his work in the usual way, can be found to have been in the exercise of due care; and, if the broken board forming the step was examined immediately after the accident and was found to have an old split where it broke and to have become worn through and chipped from use, it can be found that the step was a defective appliance, and that the employer and proprietor by using due diligence would have known of its condition.

Under R. L. c. 106 the widow of an employee, not suing as administratrix, cannot maintain an action against the employer of her husband for negligently causing his death unless the death was instantaneous and without conscious suffering.

In an action by the administratrix of an employee against his employer for injuries suffered by the intestate resulting in his death, with counts under the employer's liability act, and also a count at common law, if at the same time the same plaintiff, as widow of the intestate, has brought another action against the same defendant for causing the death of her husband, which she is not entitled to maintain, and if the judge instructs the jury, that in case the plaintiff prevails under the statute the entire damages recovered in both actions cannot exceed \$5,000, and the jury return a general verdict for the plaintiff in the second action for \$2,500, having returned a verdict for her in the first action for \$4,500, the verdict in the second action will not be allowed to stand, as it may have been returned on the statutory counts.

In an action by an administrator under the employers' liability act against the employer of his intestate for personal injuries of the intestate resulting in death, where the declaration contains no count for the death, if exceptions are sustained to an erroneous instruction relating to damages which does not affect the



issue of liability, the new trial will not be confined to the question of damages if it appears probable that the plaintiff will wish to amend his declaration by adding a count for the death of his intestate under R. L. c. 106, §§ 72, 74.

TWO ACTIONS OF TORT, the first by Margaret Smith, as the widow of George F. Smith, alleged to be for the benefit of herself and the next of kin of her husband, for his injury and death alleged to have been caused by the defective condition of a step of a car of the defendant on which the plaintiff's husband was at work as switchman, and the second by the same Margaret Smith as administratrix of the estate of her husband, with two counts under the employers' liability act and a third count at common law for conscious suffering of the plaintiff's intestate. Writs dated October 14, 1901.

In the Superior Court the cases were tried before *Sherman, J.* The evidence and the admissions of the defendant are described in the opinion.

The defendant asked the judge to rule:

1. That as the intestate experienced conscious suffering the first action cannot be maintained by the widow and next of kin, but should have been brought by the administrator, and that the law does not in any case authorize an action to be brought by a widow for the benefit of herself and the next of kin.

2. That upon the testimony and the admission of the defendant neither action could be maintained.

The judge declined to give either of these rulings, and ruled, that the first action could be maintained in its present form, and that there was evidence for the consideration of the jury in both actions, and the judge further ruled, that, if the jury found for the plaintiff in the first action, they might assess damages anywhere between \$500 and \$5,000 according to the degree of culpability or negligence of the defendant corporation. Upon the second action the judge instructed the jury as follows: "This is an action to recover for conscious suffering while George F. Smith lived, about two hours and a half, what he suffered during that two hours and a half, and the declaration in this case has three counts. The first two counts are under the employers' liability bill, and set forth that by reason of the negligence of the defendant Smith was injured and suffered, — had conscious suffering. The last count is a count at common law. There is a limit to



the first two counts; the jury must, if they find on the first two counts, the extent of the whole recovery in both actions, limit the amount of recovery to five thousand dollars; but if they should find on the third count, in that second action, at common law, then there is no limit except the amount of *ad damnum* named in the writ, and the jury may assess damages for what they find Smith suffered during those two hours and a half."

The jury returned a verdict for the plaintiff in the sum of \$4,500 in the first action, and in the sum of \$2,500 in the second action; and the defendant alleged exceptions in each case.

*W. H. Niles & H. R. Mayo*, for the defendant.

*J. H. Sisk, W. E. Sisk & R. L. Sisk*, for the plaintiff.

BRALEY, J. These are actions of tort tried together in the Superior Court, in which the plaintiff, as the widow of George F. Smith, seeks in the first to recover damages for his death under R. L. c. 106, and in the second under the same chapter, and at common law, as administratrix, for conscious suffering preceding death, both alleged to have been caused by the negligence of the defendant. Verdicts having been returned in her favor, the defendant brings the cases before us on exceptions to the refusal of the presiding judge to rule "that as the intestate experienced conscious suffering the first action cannot be maintained by the widow and next of kin, but should have been brought by the administratrix, and that the law does not in any case authorize an action to be brought by a widow for the benefit of herself and the next of kin," and that upon all the evidence neither action could be maintained. A further exception also was saved to the instructions given to the jury on the measure of damages.

We consider first the refusal to order a verdict for the defendant which was asked for upon the ground that the deceased was not in the exercise of due care, and there was no evidence of its negligence.

If either of these affirmative propositions were not sustained she cannot recover in either action.

It either was admitted, or not denied, by the defendant, that the plaintiff's intestate was injured while employed at its works, and after a short period of consciousness died from his injuries,



leaving a widow, and two minor children, who were dependent upon him for support. There was no contention that the necessary statutory notice had not been given.

At the time of the accident the deceased was working as a switchman or conductor, on a reversible motor car attached to a flat car loaded with machinery and moulds which were being transported within the yard of the defendant's works. Attached to one end of the motor car was a wooden step, extending across its entire width. This step was about fourteen inches wide by one inch in thickness, and it was supported and held in place by iron brackets raised about three inches above the level of the track.

The testimony of the plaintiff tended to show that Smith rode on the front step of the car, which was moving slowly, when he alighted, ran ahead, and threw a switch to open the track over which it was to pass. Having done so, he jumped on to the step as the car passed, which then increased its speed, and after riding a short distance the step broke, throwing him under the wheels, causing the injury from which he died. In the performance of his duties it was understood that he would ride on the car and open the switches. To do this he either would be obliged to stop the car, or get off and on while it was moving. There was also evidence from which it might have been found that when injured he was performing his work in the usual way.

The general foreman called by the defendant testified that shortly before the accident, upon observing this method of running the car he had instructed him to always use the rear step, as using the front step was dangerous, and never to get off while it was in motion, with the further admonition that if the practice was repeated he would be discharged.

But the plaintiff contended that this, and other similar testimony that the deceased was improperly on the front step, should be disregarded by the jury who were not bound to accept it. *Tyler v. New York & New England Railroad*, 137 Mass. 238. *Aiken v. Holyoke Street Railway*, 180 Mass. 8, 12. Or if taken as true, that her intestate was not required to take the safest possible course, and if he did not they still could find that under the circumstances he exercised ordinary care. *Houlihan v. Connecticut River Railroad*, 164 Mass. 555, 556.

The danger against which he had been warned was, that in



using the front instead of the rear step there was danger of falling under the moving car, while the defendant's witnesses who observed the accident testified that Smith in jumping either missed the step, or if he reached it, his feet slipped causing him to fall.

Upon the plaintiff's evidence he was placed safely on the step, and whatever danger there was in getting on had passed. If so then the efficient cause of what happened was not his conduct, even if negligent in boarding a moving car, but arose from the breaking of the step.

We now come to the question of the defendant's negligence. The strain to which the step was subjected would be the same whenever used for the purpose for which it was designed, and the defendant's duty required that it should be of sufficient strength, and kept in suitable repair. *Murphy v. Marston Coal Co.* 183 Mass. 385.

On this issue the plaintiff's evidence was to the effect that the board forming the step, which was examined immediately after the car stopped, had an old split where it broke, and had become worn through and chipped from use. This furnished proof from which the jury could say that it was insufficient, and hence a defective appliance. They further could find that the defendant by using due diligence would have known of its condition. *Murphy v. Marston Coal Co.*, *ubi supra*.

It is true that the defendant's evidence was to the contrary, and if believed the board was bright at the split except a slight weather check, and the step had been broken by coming in contact with the body of Smith as the car passed over him.

Plainly the evidence on both these issues could not be reconciled. Being conflicting, the due care of the deceased, and the negligence of the defendant, therefore, were questions not of law but of fact, which were submitted to the jury under instructions to which no exceptions were taken, and within whose province it was to pass on the weight and credibility of the witnesses. *Brown v. Greenfield Life Assoc.* 172 Mass. 498, 502, 503. *Powers v. Boston & Maine Railroad*, 175 Mass. 466.

While our conclusion on this branch of the case would allow the plaintiff to retain the verdicts returned if nothing further was involved, the question remains whether either action can be maintained in the form in which it is brought.



Neither at common law, nor under R. L. c. 171, § 1, could an action for the death of the deceased, though caused by the unlawful act of the defendant, be sustained by his widow, or relatives, or personal representatives. *Palfrey v. Portland, Saco & Portsmouth Railroad*, 4 Allen, 55. *Kearney v. Boston & Worcester Railroad*, 9 Cush. 108. *Carey v. Berkshire Railroad*, 1 Cush. 475. *Moran v. Hollings*, 125 Mass. 93. *Worcester & Suburban Street Railway v. Travelers Ins. Co.* 180 Mass. 263, 265.

Such a right, under certain conditions and forms of remedy, has long been given against cities and towns, common carriers of passengers, and corporations operating railroads, to which corporations operating street railways were subsequently added. Pub. Sts. c. 73, § 6; c. 52, § 17; c. 112, § 212. Sts. 1886, c. 140, now R. L. c. 51, § 17; c. 70, § 6; c. 111, § 267. *Bowes v. Boston*, 155 Mass. 344, 349. *Holland v. Lynn & Boston Railroad*, 144 Mass. 425, 428.

By the employers' liability act as originally passed where "an employee is instantly killed or dies without conscious suffering" his widow or next of kin if dependent upon him for support at the time of his death is given a right of action against his employer for damages. St. 1887, c. 270, § 2. R. L. c. 106, § 73.

No provision, however, was made for such recovery if death was not instantaneous, or without regaining consciousness. *Ramsdell v. New York & New England Railroad*, 151 Mass. 245.

This statutory right was subsequently enlarged by the St. of 1892, c. 260, now R. L. c. 106, § 72, to include a case where the decedent before death consciously suffered.

But the form of remedy was limited to his personal representatives. While they were entitled to recover damages for the injuries received, which upon recovery would become assets of his estate and might or might not finally be shared by the widow or dependent next of kin, they were also within the same action allowed to recover damages for his death.

By this double procedure the maximum amount recoverable is limited. Whatever sum is awarded must be apportioned by the jury, which gives to an administrator the damages assessed for personal injuries to his intestate, and to the widow, or to those entitled if the deceased leaves no widow, damages for death assessed according to the degree of culpability of the employer. R. L. c. 106, § 74.



The difference between this remedy and that given where death is instantaneous, or follows without recovering consciousness, grows out of different statutory conditions.

Under one form of death no cause of action is given to the personal representatives, while in the other, independently of § 74, they can recover for the personal injuries suffered by their decedent.

It is the object of this section in requiring a joinder to avoid multiplicity of suits, and to keep the entire damages recoverable within the imposed restriction. No provision is made for separate actions, and being a purely statutory remedy it must be strictly followed. The first action therefore cannot be maintained. *Dacey v. Old Colony Railroad*, 158 Mass. 112, 118.

In the action as administratrix there were three counts, two under the statute, and one at common law, but she was not compelled to insert a count for the death of her intestate, and the pleadings present the usual case of an action for personal injuries, which survived under R. L. c. 171, § 1.

Under the instructions given the jury were told that if the plaintiff prevailed under the statute, the entire damages recovered in both actions could not exceed \$5,000. But if they found under the count at common law, then the *ad damnum* of the writ was the maximum limit.

For reasons already stated the first part of these instructions was erroneous, and a general verdict having been returned there is nothing upon the record to show that it might not have been rendered upon the statutory counts.

Ordinarily, as this error does not affect the issue of liability, which was fully and correctly tried, a new trial should be confined to the question of damages. But it is probable that the plaintiff originally intended to recover all damages to which she was entitled, in whatever form assessed, and made a mistake in her remedy. This may be cured by the allowance of an amendment which is within the discretion of the trial court.

Moreover, the defendant does not ask for the limitation suggested, and substantial justice between the parties will be done if it is not imposed. The order in each case must be,

*Exceptions sustained.*



**CLARA CHISHOLM vs. DANIEL A. DONOVAN & another.**

**Essex.** May 17, 1905. — June 20, 1905.

**Present:** KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Negligence, Employer's liability.*

A lining maker in a shoe factory, who has been employed in the same room for several months in the previous year, assumes the risk of injuries from falling over the steel cover of a power shaft crossing the floor of a passageway connecting two alleys between the machines in the room, and there is no duty on the part of her employer to inform her of the obvious existence of the shaft.

TORT, by a lining maker in a shoe factory at Lynn against her employer, for injuries sustained a little after half past five o'clock in the afternoon of December 8, 1901, by falling over the steel cover of a power shaft crossing the floor of a passageway in the room where she was employed. Writ dated January 6, 1902.

In the Superior Court the case was tried before *Hardy, J.* who refused to order a verdict for the defendants, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$360; and the defendants alleged exceptions.

*F. B. Kendall*, for the defendants.

*J. H. Sisk, W. E. Sisk & R. L. Sisk*, for the plaintiff.

KNOWLTON, C. J. The plaintiff was employed in the defendants' stitching room at stitching the linings of shoes. In this room were two rows of sewing machines, running lengthwise with the room, and each machine was operated by a shaft furnishing power, running under the machines, five inches from the floor, through the whole length of the row. In the second row were three openings used as passageways from one alley to the other. Over the shaft where it crossed these openings, were semi-cylindrical steel covers of a dark color, which protected the shaft, and prevented one, in passing over it, from coming in contact with it. The plaintiff tended one of the machines in this row, and had been at work according to some of the witnesses a few days, and according to others three or four weeks, immediately before the accident. She had also worked in the



same capacity in the same room for several months, more than a year before the accident, but not on the second row of machines. The machines in this row were put in during the interval while she was not employed by the defendants. She had been a lining maker, working in a similar way, for fifteen years. She started from the machine where she was working, and, in passing through the opening in that row, she struck her foot against the cover of the shaft, and fell forward to the floor and was injured. The suit is brought to recover for this injury.

When she entered the defendants' service, not long before the accident, she impliedly agreed to assume all the open and obvious risks of the business. It is not contended that the defendants owed her a duty to remove or change the line of shafting which furnished power for the machines on which she was to work.

It is contended by the plaintiff that it was the duty of the defendants to inform her of this shaft, or to furnish additional light, and it is not suggested that they were negligent in regard to the performance of any other duty. The existence of this shaft was open and obvious to every one who attempted to operate a machine. The plaintiff had been working many months the previous year at a machine in the next row, for which power was furnished by a similar shaft. She had worked as a lining maker fifteen years. Plainly the defendants were not called upon to give her any information or warning as to the existence of this shaft.

The contention as to lighting the room relates to the same subject. Upon the undisputed evidence, there was a large window about ten feet from the opening where the accident happened, and it was light enough to do stitching at the time of the accident. There was testimony that the work of stitching required a great deal of light, and the rows of machines were near the windows. Moreover, there was a gaslight above each machine, which the operator was at liberty to light at any time when the light from the windows was insufficient. There was testimony from some of the witnesses that the light above one of the machines, next the opening where she was hurt, was lighted at the time of the accident. It is difficult to see how anything more could have been done than was done for the



safety of the plaintiff. If she had been reasonably careful, she hardly could have been injured by this covered line of shafting, five inches above the floor, across which there was a passageway from one alley to the other. The principles which govern the case have been enunciated in many decisions. *Rooney v. Sewall & Day Cordage Co.* 161 Mass. 153. *Lemoine v. Aldrich*, 177 Mass. 89. *Hoard v. Blackstone Manuf. Co.* 177 Mass. 69. *Thompson v. Norman Paper Co.* 169 Mass. 416. *Gleason v. Smith*, 172 Mass. 50. *Murch v. Wilson's Sons & Co.* 168 Mass. 408, and cases there cited. There was no evidence of negligence on the part of the defendants.

*Exceptions sustained.*

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JOHN J. SULLIVAN, administrator, vs. TIMOTHY M. SULLIVAN.

Worcester. May 18, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Bills and Notes. Evidence, Presumptions and burden of proof. Limitations, Statute of. Spoliation of Instruments. Maxims.*

In an action by an administrator on a promissory note alleged to have been given by the defendant to the plaintiff's intestate and to have been destroyed wrongfully by the defendant after the death of the intestate, if the plaintiff proves that the defendant gave the note and destroyed it as alleged, but there is nothing to show the date of the note or when it was payable or how it was executed except that it was signed by the defendant, there is an inference that at the time of the spoliation after the death of the intestate the note was valid and was enforceable against the defendant upon the appointment of an administrator, so that under R. L. c. 202, § 10, the administrator may recover on the note if his action is brought within two years from the time of his giving bond as limited by R. L. c. 141, § 9.

Citation by KNOWLTON, C. J. of cases relating to the spoliation of instruments.

CONTRACT, by the administrator of the estate of Mary Murley, late of Boston, for certain money and property alleged to have belonged to his intestate, including a claim for \$500 for money lent on a note, with a count, added by amendment, on a promissory note for \$500 alleged to have been given by the defendant to the intestate and to have been destroyed by the



defendant after the death of the intestate. Writ dated June 18, 1900. Declaration amended January 8, 1904.

At the trial in the Superior Court *Pierce*, J. made the rulings stated in the opinion. The jury returned a verdict for the plaintiff in the sum of \$718.17; and the defendant alleged exceptions.

*H. L. Parker & H. L. Parker, Jr.*, for the defendant.

*W. A. Gile*, for the plaintiff.

KNOWLTON, C. J. This is an action upon a promissory note, alleged to have been given by the defendant to the plaintiff's intestate, who died in 1882. There was evidence tending to show that such a note was given, that it was for \$500, with interest at five per cent, and that, at some time after the death of the payee, the defendant, with whom she was living at the time of her death and who took and disposed of her effects, destroyed the note by burning it. The plaintiff was appointed administrator of the estate on March 2, 1899. This action was begun on June 18, 1900. The date when the defendant destroyed the note did not appear, although apparently it was a long time before the appointment of the administrator; and there was nothing to show the date of the note, nor when it was payable, nor how it was executed, further than that the signature was that of the defendant.

The judge instructed the jury that, if they found that the defendant gave the note in consideration of \$500 received by him, and destroyed the note, they would have a right to infer that it was a witnessed note, and of a kind that would sustain this action. The instruction was an application of the maxim, *Contra spoliatorem omnia præsumentur*. There is no doubt that the evidence presented a case for an inference that, at the time of the spoliation, the note was valid and enforceable against the defendant, upon the appointment of an administrator. The defendant's act, in connection with the other facts, had a tendency to show that he was seeking to deprive the estate of evidence which might be used against him.

Upon the hypothesis stated in the instruction, there was a finding by the jury which sufficiently established the identity of the note, and the only matter left in doubt was its terms, in reference to the application of the statute of limitations. If



there was a proper inference from the defendant's wrongful act that it was then a valid note, it follows that the administrator can maintain an action upon it, brought at any time within two years after his appointment. This is provided by the Pub. Sta. c. 197, § 12. R. L. c. 202, § 10. Under this section, if the statute of limitations has not taken effect before the death of a person entitled to bring or liable to an action, or if the death occurs within thirty days after the statute ordinarily would take effect, the time is extended, and the suit may be brought at any time within two years after the appointment of an executor or administrator. It is, therefore, unnecessary to consider whether the principle referred to should be so applied as to warrant an inference that the note was witnessed, so as to enable the plaintiff to rely upon the Pub. Sta. c. 197, § 6. R. L. c. 202, § 1, cl. 8. The general doctrine touching the spoliation of instruments has been stated in many cases, but there is doubt whether some of these statements are not too broad. See *Life & Fire Ins. Co. v. Mechanic Ins. Co.* 7 Wend. 31, 34; *Cross v. Bell*, 34 N. H. 82, 88; *Bott v. Wood*, 56 Miss. 136; *Jones v. Knauss*, 4 Stew. 609; *Clifton v. United States*, 4 How. 242, 248; *Thompson v. Thompson*, 9 Ind. 323, 332; *Chicago City Railway v. McMahon*, 103 Ill. 485; *Dimond v. Henderson*, 47 Wis. 172; *Wigmore*, Ev. § 291 and note. But we have no doubt that the rule rightly was applied to the present case, at least so far as the general liability of the defendant is concerned, in view of the R. L. c. 202, § 10.

*Exceptions overruled.*

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### COMMONWEALTH vs. RAY C. JOHNSON.

Suffolk. May 19, 1905. — June 20, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Murder. Insanity. Practice, Criminal. Evidence, Opinion: experts.*

In a trial for murder, where the defence is insanity, the order in which evidence of insanity shall be introduced is within the discretion of the court.

In a trial for murder, where the defence is insanity, the restriction of the cross-examination of government experts upon the relative value and reputation of



medical authorities who have written upon insanity is within the discretion of the court, and so is the exclusion of a hypothetical question on a ground of form.

In a trial for murder, where the defence is insanity, if the physical and mental history of the defendant and his family comes solely from the defendant's statements, letters and admissions or from his witnesses, and is accepted by the government as true, an expert for the government, who has made examinations of the defendant, may be asked whether from all his examinations and investigations, and from what he has heard in court, he has formed any opinion as to the mental condition of the defendant on the day of the alleged murder, and, on answering this question in the affirmative, and giving an opinion that the defendant was sane at that time, he can be asked further what is his opinion of the defendant's sanity at the time the question is put.

Where in a criminal case the instructions requested by the defendant have been given in substance so far as applicable, no exception lies to the refusal of the judge to give them in the language of the requests.

In a trial for murder in the second degree, where the defence was insanity, the judge in charging the jury, after reading to them a passage from the opinion in *Commonwealth v. Rogers*, 7 Met. 500, 501, further instructed the jury that a complete purpose or design to kill must be shown, and that the burden of proof was upon the Commonwealth to satisfy them beyond a reasonable doubt that the defendant was legally responsible at the time of the killing, or in other words was sane. *Held*, that this was a correct statement of the law.

In a trial for murder, where the defence is insanity, it is not necessary that experts testifying for the government as to the mental condition of the defendant should state the grounds or reasons for their opinions, the defendant having the opportunity to ask for the grounds of their opinions on cross-examination.

INDICTMENT, found and returned in the Superior Court for the County of Suffolk on February 6, 1904, for the murder of one Sarah A. Peters on January 5, 1904, by shooting her with a pistol.

Before the trial the district attorney entered a *nolle prosequi* as to so much of the indictment as charged murder in the first degree, and the defendant was tried before *Bond, J.* for murder in the second degree. The jury returned a verdict of guilty; and the defendant alleged exceptions, raising the questions stated by the court.

*J. J. Walsh & J. F. Lynch*, for the defendant.

*M. J. Sughrue*, First Assistant District Attorney, for the Commonwealth.

BRALEY, J. Of the numerous exceptions taken, only those relating to the general conduct of the trial, the evidence of the medical experts called by the government, the method of their examination, the refusal to give certain requests for rulings asked by the defendant, and to portions of the charge



have been argued. We consider them in the order of their presentation.

There was ample evidence of the homicide, which indeed was not denied by the defendant, and the only defence offered was his insanity at the time.

Upon this issue it was competent for him to show that his ancestors or relatives had been insane, but the order in which this evidence should be introduced was wholly within the discretion of the court.

The ruling made at first, that before its introduction there must be some preliminary proof of insanity when he committed the act, later was modified, and the evidence admitted without this restriction.

Complaint, however, is made that before making this modification the presiding judge, in the absence of the jury, irregularly heard counsel, and took the opinion of medical experts for the purpose of ruling upon the question.

But the defendant was not prejudiced by the temporary exclusion of the evidence, or by the preliminary hearing, for it is common practice in the course of trials to permit the jury to retire while questions of law are discussed for the purpose of formulating final rulings.

The prisoner and his counsel were present throughout the discussion, and as the issue of his sanity finally was submitted to the jury he suffered no injury, and the course adopted must be held to have been discretionary. *Nash v. Hunt*, 116 Mass. 237, 253. *Commonwealth v. Piper*, 120 Mass. 185, 186.

Before taking up the general subject of the form of question which was asked of the government experts, it should be said that the refusal to permit their cross-examination upon the relative value and reputation of medical authorities who had written upon the general subject of insanity, as well as the exclusion of certain hypothetical questions addressed to them, are governed by the same rule. *Commonwealth v. Sturtivant*, 117 Mass. 122, 139. *Jennings v. Rooney*, 183 Mass. 577, 579.

To each of these witnesses the government was allowed to put these and other similar questions, subject to the defendant's objection and exception, "Have you formed any opinion from all your examinations and investigation, and what you have heard



in court, as to the mental condition of the defendant on the fifth of January, 1904?" "From all you have observed of this man and from all that you have heard in court have you formed an opinion of what his mental condition was on the fifth of January, 1904?"

The physical and mental history of his family and himself, upon which they were founded, came solely from the defendant's statements, letters and admissions or from his witnesses, and was accepted as true, while it further appears that each of the experts also had seen and examined him.

Upon answering in the affirmative they severally gave an opinion that he was sane, and then made a similar reply to the further question, "What is your opinion as to his sanity now?"

If a question of this character resting on the assumption of the truth of the evidence of a plaintiff alone is admissible, which was held in *Twombly v. Leach*, 11 Cush. 397, 402, 405, there is in principle no substantial reason why a medical expert who has not made an examination of the patient whose physical or mental condition he is called upon to determine, but has heard it described by witnesses at the trial, should not answer similar questions without their being hypothetically framed. *Stoddard v. Winchester*, 157 Mass. 567, 575. *McCarthy v. Boston Duck Co.* 165 Mass. 165, 166.

By this form of examination no injustice is done, for whatever reasons even to the smallest details that an expert may have for his opinion can be brought out fully by cross-examination.

But here as in other matters relating to the general management of trials much must be left to the judgment of the trial court, which will not be revised unless the course pursued plainly was prejudicial to the legal rights of the defendant, which does not appear in the present case. *Commonwealth v. Piper*, *ubi supra*.

Thus the length of hypothetical questions, or whether the facts assumed are within the hypothesis on which it is claimed the case rests, or whether a witness is professionally qualified, or is sufficiently acquainted with the history of the case to give an opinion, are as well within the reasonable exercise of this power as the order of presentation of evidence, or the length



of time permitted to counsel for argument if beyond the limit fixed by a general rule, or the scope of cross-examination of witnesses. *Commonwealth v. Piper, ubi supra*. *Shea v. Glendale Elastic Fabrics Co.* 162 Mass. 463, 465. *Chalmers v. Whitmore Manuf. Co.* 164 Mass. 532, 533. *Forsyth v. Doolittle*, 120 U. S. 73.

It further must be held that as each of these experts also testified from personal observation of the defendant, a direct question calling for their opinion formed on such an examination would have been competent.

As the case stood their opinions rested upon the assumption of the truth of the uncontradicted testimony so far as material which each had heard, considered in the light of the knowledge of his intellectual condition previously obtained from actual contact.

The number of witnesses does not alter the practical operation of the rule if there was no conflict of evidence, or the facts so complicated that there may be danger of the jury being confused and misled.

Accordingly this form of interrogation was fully recognized and approved in *Hunt v. Lowell Gas Light Co.* 8 Allen, 169, 172, which has been followed in *Hand v. Brookline*, 126 Mass. 324; *Stoddard v. Winchester, ubi supra*; *Oliver v. North End Street Railway*, 170 Mass. 222; *Rafferty v. Nawn*, 182 Mass. 503. It apparently was used with approval and without objection in *Commonwealth v. Pomeroy*, 117 Mass. 143. But if the evidence is of a complicated and contradictory character, and such that it would be likely to be understood differently by intelligent jurors, the question should call for the facts on which the opinion is founded.

In this connection a minor exception relating to the admission of evidence descriptive of the attitude and appearance of the defendant when under scrutiny by one of the experts may be noticed. This was entirely competent either as being in the nature of a conversation with him, or, as furnishing a reason for the opinion of the witness.

We now pass to the exceptions relating to the instructions given to the jury, and the refusal to give the defendant's tenth, eleventh, twelfth, sixteenth and nineteenth requests.



If so far as applicable the rulings requested were given, though in other language, their refusal in the form presented affords no ground of exception. *Commonwealth v. Costley*, 118 Mass. 1, 25. *Graham v. Middleby*, 185 Mass. 349. *Commonwealth v. Adams*, 186 Mass. 101, 107.

The tenth and eleventh requests related solely to his mental capacity at the time, while the twelfth, sixteenth and nineteenth asked for instructions that if mentally irresponsible premeditation of the homicide, even if united with the passions of hatred, malice or revenge, were not incompatible with an unsound mind, and that if the jury had a reasonable doubt of his sanity, he was entitled to an acquittal, though possessed at the time of sufficient reason to enable him to distinguish between moral right and wrong.

An examination of the entire charge in connection with these requests, and the urgent argument of the defendant, fails to reveal any error of law.

In presenting to the jury the law governing the case it was not only within the province, but it became the duty of the judge to call to the attention of the jury the evidence so far as it might be illustrative of the legal principles involved, and an aid to the proper understanding of the issues presented for their decision. In so doing the presiding judge is not required to select particular facts or aspects of the evidence for comment that are favorable to either party, but he may state generally his recollection of the testimony. *Littlefield v. Huntress*, 106 Mass. 121. *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485, 488.

So also the illustrations used to explain the necessity and value of opinion evidence were well within this practice, and unexceptionable. *Melledge v. Boston Iron Co.* 5 Cush. 158. *Burns v. Donoghue*, 185 Mass. 71, 73.

Their attention very properly was pointedly called to what the defendant had said after committing the crime, as well as his previous mental condition, with the object of directing them to the sole issue whether he was responsible for the killing of the deceased.

They previously had been told that for this act he would not be accountable "if at the time when the act was committed he was prevented by defective mental power, or by disease affecting



his mind, from knowing the nature and quality of his act, or from knowing that the act is wrong, was in violation of law, and that he would be punished, or from controlling his conduct unless the power of control has been superinduced by his own conduct."

The law relating to his responsibility was again fully stated as follows: "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." *Commonwealth v. Rogers*, 7 Met. 500, 501.

When with this instruction the further statements are found, that a complete purpose or design to kill must be shown, and that the burden of proof was upon the Commonwealth to satisfy them beyond a reasonable doubt that he was legally responsible at the time, or in other words was sane, not only had the defendant's requests so far as proper been given in substance, but the law also had been fully and correctly stated. *Commonwealth v. Heath*, 11 Gray, 303. *Davis v. United States*, 160 U. S. 469, 481-483; *S. C.* 165 U. S. 373, 378. See charge of Chief Justice Gray in *Commonwealth v. Pomeroy*, for murder, reported in the appendix to Wharton on Homicide, (2d ed.) 753. Also charge of Mr. Justice Charles Allen in *Goodwin's case*, for murder, Essex, 1885, in the official report published by the attorney general.

Nor was this general instruction qualified or affected by an expression afterwards used, which was made the subject of an exception, that it must be "proved, to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state." Neither does it afford reasonable ground for the argument advanced that the judge thus erroneously placed upon the defendant the burden of proving by a preponderance of the evidence that he was mentally irresponsible.

The exception to the omission of any instruction that experts when testifying as witnesses must state the grounds or reasons for their opinions is equally untenable. If the defendant desired



their reasons his counsel were not precluded from asking for them on cross-examination. There is no general rule of practice which makes it imperative on the party calling such a witness that after he has been duly qualified, and given an opinion, his reasons therefor also must be stated, though it is frequently done. *Sexton v. North Bridgewater*, 116 Mass. 200.

The statement made in commenting upon the form of the question addressed to one of the defendant's medical witnesses was not for the purpose of saying that a tendency to insanity was unimportant as a symptom, but the reference evidently was to enable the jury clearly to understand the real issue presented. And this was the defendant's accountability for the crime charged, which depended upon his sanity when it was committed. *Dole v. Thurlow*, 12 Met. 157.

The defendant further contended that the language used when referring to the opinions of the government experts was partial, and especially is open to the objection of being a charge upon the facts, prohibited by statute. R. L. c. 173, § 80.\*

But this instruction, carefully guarded, left the credibility and weight of their evidence to the jury, who must have understood they were free to make such application of it as they chose. *Commonwealth v. Larrabee*, 99 Mass. 413, 416. *McKean v. Salem*, 148 Mass. 109, 114.

*Exceptions overruled.*

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\* The passage in the judge's charge here referred to, which was quoted in the defendant's brief, was as follows: "Now, it is for you to say what weight their opinion is entitled to, the weight of their opinions in view of their honesty, in view of their intelligence, in view of their willingness to testify fairly with reference to the matter, without bias or prejudice as to either side, whether the experience that they have had is sufficient to give them some knowledge which you can rely upon. And you will say from their testimony, understanding what they had seen of the defendant, and what they have heard from the testimony here, with reference to him, whether their opinion as it was given to you can be relied upon by you when they say there was no evidence, has not been any evidence here, that this man was insane, had no disease of the mind so that he was insane."



## GEORGE W. TAYLOR vs. BOSTON AND MAINE RAILROAD.

Middlesex. November 15, 1904. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; LORING, JJ.

*Negligence, Employer's liability. Railroad.*

A brakeman in a freight yard, injured at two o'clock in the morning by having his left arm caught between two cars when in the usual course of his employment attempting to uncouple one of the cars from the other, may be found not to have assumed the risk of such an injury, if there is evidence that the cars came together because one of them was defective, the bumper, draw bar and end sills being gone from it, and that the plaintiff did not know of the defective condition of the car, that when there were broken cars to be handled the conductor told the men, although he did not inform them particularly as to the nature of the damage, and that the conductor did not tell the brakeman that this car was damaged.

R. L. c. 111, § 203, forbidding a railroad corporation to haul a car not equipped with automatic couplers "in moving traffic" between points in this Commonwealth, and § 209 of the same chapter, providing that an employee of a railroad corporation injured by any car used contrary to this provision shall not be considered to have assumed the risk of such injury, although he continues in the employment of such corporation after the unlawful use of such car has been brought to his knowledge, do not apply to a car being moved to a repair shop to be repaired.

MORTON, J. The plaintiff was tail-end brakeman on the night shifting crew in the defendant's freight yard at Somerville, and was injured by having his right arm caught between two cars which came together while he was trying to cut off one of them from the rear of the train. The bumper, draw bar and end sills were gone from the car, which allowed it and the next car to come together. This action was brought for the injuries thus received. At the close of the evidence the judge, at the defendant's request, directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to this ruling.

We think that the ruling was wrong and that the exceptions should be sustained. It is not contended that the car was not in a defective condition. It had been examined by an inspector who had ordered it to be sent to the repair shop at Charlestown. It was taken from there to be sent to the repair shop at Fitchburg, and at the time of the accident was in the freight yard at



Somerville. The accident occurred at about two o'clock in the morning. The plaintiff testified that he did not know that the car was defective; "that while he was cutting off the car he saw the signal given for the engineer to go back, and he put his right hand in and caught hold of the ladder; threw his foot on to the step and was going to pull the pin (coupling-pin) with his left hand; that he caught hold of the ladder at the end of the damaged car to cut it off; that he had just barely time to get his hand in between them; that there was nothing to prevent the two cars coming together; that he had his arm between them"; meaning evidently that it was between them when they came together. Subsequently he explained, in answer to questions by his counsel, why he was going to pull the coupling-pin with his left hand, and according to the explanation thus given his position was one of less danger than it would have been if he had attempted to pull it with his right hand. Apparently the position assumed was adopted from general considerations of safety and not because he knew of the defective condition of the car and was endeavoring to guard against injury from that. At least we cannot say that the jury would not have been warranted in so finding, notwithstanding that they would also have been warranted in finding that the cars were hitched together with a "chain hitch," as it is termed, which the plaintiff assisted in making, and that he admitted that he knew that it was dangerous to attempt to uncouple cars so hitched together, in which case the defendant would have been entitled to their verdict. The defendant contends that the plaintiff assumed the risk. And if, with full knowledge of its defective condition, the plaintiff attempted to uncouple the car, or if in the usual course of his employment it was his duty to work on damaged cars without any other notice or warning of their condition than such as might be obtained from the cards which the testimony tended to show had been placed on the car in question, then in either case he would be held as matter of law to have assumed the risk. But as already observed he testified that he did not know of the defective condition of the car. He also testified that he did not see the brake, meaning that on the damaged car, till the Saturday after he was hurt, when he went down and looked at it. There also was testimony tending to show that when there



were broken cars to be handled the conductor told the men, though he did not inform them particularly as to the nature of the damage. The plaintiff testified that the conductor did not tell him that the car was a damaged, or "shop car," as damaged cars were called. In view of this testimony it could not be ruled as matter of law that the plaintiff assumed the risk or was guilty of contributory negligence. It was for the jury to say, taking all the circumstances into account, whether he was testifying truly or not and what the facts were.

The plaintiff further contends in regard to assumption of the risk that the case is governed by R. L. c. 111, §§ 203, 209, which provide that "in moving traffic" between places in this Commonwealth a railroad corporation shall not haul or permit to be hauled or used on any of its lines a car which is not equipped with couplers coupling automatically by impact, and that an employee who is injured by any locomotive, car or train used contrary to these provisions shall not be deemed to have assumed the risk of such injury. But we deem it enough to say that the uncontradicted testimony shows that the damaged car was not being used "in moving traffic" but was being taken to a repair shop to be repaired. The case does not, therefore, come within the statute.

The conductor testified, amongst other things, that the car was not to be cut off and that he gave the plaintiff no orders to uncouple it. But there was testimony that the yard master in the plaintiff's hearing had ordered it to be placed on another track, and from this and other evidence the jury would have been warranted in finding that the plaintiff was acting in the usual course of his employment in attempting to uncouple the car.

*Exceptions sustained.*

*J. J. Shaughnessy*, for the plaintiff.

*F. N. Wier*, for the defendant.



MARGARET T. CALLAHAN vs. MERCANTILE TRUST  
COMPANY & others.

JAMES J. LOGAN vs. MARGARET T. CALLAHAN.

Suffolk. November 28, 1904. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, HAMMOND, & LORING, JJ.

*Equity Jurisdiction. Equity Pleading and Practice.*

A woman who executes and acknowledges a discharge of an old mortgage and an assignment of a new one, representing the investment of all her savings, because she has implicit confidence in her legal adviser and without reading the instruments or understanding their purport, and entrusts all the papers including the mortgage note indorsed in blank to the possession of her legal adviser, if her legal adviser sells the mortgage and absconds with the proceeds, has no remedy in equity against the persons who have purchased the mortgage from him in good faith or against a trust company to which the mortgage has been assigned as security for an advance of the purchase money.

Where a defendant in equity files a cross bill stating a case entitling him to affirmative relief and the original bill is dismissed, the cross bill may be retained for the purpose of granting relief as if it were an original bill.

BILL IN EQUITY, filed January 17, 1903, by Margaret T. Callahan against the Mercantile Trust Company and James J. Logan, and Simon Bilosky and Lewis P. Kaufman, the two last named defendants being added by an amendment allowed by the court on May 26, 1903, and a CROSS BILL, filed March 20, 1903, by the defendant Logan against the plaintiff in the first bill.

By the first bill the plaintiff sought to establish her title to a \$5,000 mortgage upon land of the defendant Logan, the plaintiff in the cross bill, of which the Mercantile Trust Company, another defendant, held the record title by an assignment from Margaret T. Callahan, under which, as between the trust company and Kaufman and Bilosky, the other defendants, the mortgage was the property of those defendants, and was held by the company only as collateral security for a debt of \$4,000 due to it from them.

The case was sent to a master, who made a report stating the facts, and came on to be heard before Loring, J., who by agreement of counsel reserved the case for determination by the full



court upon the pleadings and the report of the master, such decree to be filed as equity might require.

From the report it appeared that in April, 1901, Logan, owning certain land upon which he was erecting a house, applied to Mrs. Callahan for a loan of \$5,000 and that she agreed to make the loan to be secured by a mortgage upon the land. Being ignorant of such matters she employed one Michael J. Moore, an attorney at law, and relied upon him to attend to the business. As the building was in process of construction the agreement was made for a temporary mortgage, the money to be paid to Logan as the building progressed, and for a new mortgage for three or five years to be given by him to Mrs. Callahan to take the place of the temporary mortgage when the building should be finished. In accordance with this arrangement the temporary mortgage and note for \$5,000, dated April 17, 1901, were executed by Logan, and Mrs. Callahan turned over to Moore certain bank books by means of which Moore from time to time drew out and paid over to Logan the money as the building progressed. Moore delivered to Mrs. Callahan the mortgage note, but kept the mortgage, which she frequently asked him to deliver to her, he putting her off by various excuses.

In January, 1902, Moore drew up the permanent mortgage dated January 9, 1902, and caused it to be executed and acknowledged by Logan. This was done without the knowledge of Mrs. Callahan, and the new mortgage and note were kept by Moore in his possession without recording the mortgage.

In May, 1902, Moore, without the knowledge or consent of Mrs. Callahan, negotiated a sale of the new mortgage to the defendants Kaufman and Bilosky for the sum of \$4,500. Thereupon he drew a discharge of the mortgage of April 17, 1901, and the assignment to the trust company, held by it when the bill was filed, and on May 7, 1902, took the discharge and the assignment to Mrs. Callahan at her home and obtained her signature to them. He gave her no explanation of the contents and she was ignorant of the purport or purposes of the transaction. She also indorsed in blank the second mortgage note, and affixed her signature to an assignment dated May 7, 1902, of a fire insurance policy on the mortgaged house, but in ignorance of Moore's purpose to sell the mortgage. As a justice of the peace



Moore also took Mrs. Callahan's acknowledgment of the discharge and of the assignment at her residence, but did not fill in the acknowledgment. Bilosky and Kaufman, who had agreed that they would buy the mortgage for \$4,500, did not have that sum. They had applied to the defendant trust company for a loan and the company had agreed to lend them \$4,000 upon their own note with the Logan mortgage of January 9, 1902, as collateral. One Perry as conveyancer for the trust company had examined the mortgaged property and the title. He raised a question as to the taking by Moore of Mrs. Callahan's acknowledgments of the discharge and assignment. Thereupon in the afternoon of May 7, 1902, with the knowledge of Perry, one Morris, an attorney, was sent by Moore to take the acknowledgments of Mrs. Callahan to the discharge and assignment at her residence. She then observed in the assignment the words "Mercantile Trust Company" and asked "What have I to do with the Mercantile Trust Company?" Morris replied, "I don't know a thing about it. I supposed you knew what they meant when you signed them." She then replied that Mr. Moore was her lawyer, and he would not ask her to do anything wrong, and she thereupon acknowledged both the discharge and the assignment. The transaction was completed on or about May 7, 1902, Moore delivering to the trust company the mortgage note of \$5,000 dated January 9, 1902, and indorsed in blank by Mrs. Callahan, the mortgage of that date which was put upon record May 7, 1902, the discharge dated May 5, 1902, of the mortgage of April 17, 1901, the assignment dated May 5, 1902, of the mortgage of January 9, 1902, and the fire insurance policy with the assignment thereon from Mrs. Callahan. At the same time Kaufman and Bilosky gave to the trust company their note for \$4,000 and each of them paid to Moore \$250 in money, and the trust company gave to Bilosky its check for \$4,000 and he turned the check over to Moore, so that Moore received \$4,500 for the mortgage and note of January 9, 1902. No inquiry was made by the trust company or its conveyancer or by Kaufman or Bilosky as to Mrs. Callahan's knowledge of the transaction or as to Moore's authority to sell the note and mortgage. About a month after this transaction Mrs. Callahan saw Moore and inquired of him what she had to do with the



Mercantile Trust Company, and he replied that he had put the papers in there so that they would be handy to get at when Mrs. Haggerty came in to buy the house, he having previously talked with Mrs. Callahan about a Mrs. Haggerty purchasing the mortgaged estate.

Moore appropriated to his own use the \$4,500 and absconded in September, 1902. Until that time he was in good standing as an attorney.

Until December, 1902, Mrs. Callahan was ignorant of the receipt of the \$4,500 by Moore. She never received any part of the money, and did not know of the delivery of the papers to the trust company until December, 1902, and was not informed of the transaction before that time, except as appears in the facts already stated.

Logan, the mortgagor, paid interest upon the mortgage note on July 9, 1902, and on January 9, 1903, to the trust company.

The bill prayed that the trust company and Kaufman and Bilosky might be enjoined from transferring the note and mortgage of January 9, 1902, to any one other than Mrs. Callahan; that Logan might be enjoined from paying any part of the interest or principal to any one other than her; that the trust company and Kaufman and Bilosky might be required to account for and to pay over to her any interest or principal paid to them by Logan, and that they might be ordered to execute the instruments and indorsements necessary to vest in her a clear title to the note and mortgage of January 9, 1902.

The cross bill prayed that Mrs. Callahan might be enjoined from transferring the note of April 17, 1901, and be directed to deliver it up for cancellation.

*W. A. Munroe*, (*A. M. Chandler* with him,) for the plaintiff.

*G. Cunningham*, (*R. F. Herrick* with him,) for the Mercantile Trust Company.

*J. J. McCarthy*, for Logan.

*F. J. Maloney*, for Bilosky and Kaufman, submitted a brief.

HAMMOND, J. Upon the facts found by the master this is a hard case for the plaintiff. She entrusted to her legal adviser the savings of a lifetime and he shamefully abused the trust. And yet we can see no principle of law upon which she can be relieved as against any of these defendants.



There is nothing to justify a suspicion that any of them acted except with entire honesty and in the exercise of absolute good faith. Moore, her attorney, was the only person guilty of fraud. She saw fit to trust him implicitly, and to execute and acknowledge such instruments as he asked for, and it was solely by reason of these acts of her own that Moore was enabled to sell and deliver with her own genuine signature and acknowledgment the note and mortgage, and appropriate the proceeds to his own use. There was no forgery of her name, nor was she induced to sign or acknowledge any instrument by any false representation at the time on the part either of Moore or of any other person. She simply trusted him, signed what he put before her, and allowed him to have in his own possession all the documents which enabled him to deliver to the trust company the note and mortgage of January 9, 1902, with everything necessary to give the company an apparently perfect title to the same as a first mortgage. Before the delivery of any of the documents to any of the defendants she noticed the name of the trust company in the assignment and inquired of Mr. Morris, an attorney at law, who was there to take her acknowledgment, what she had to do with the trust company, and when he replied to her that he did not know but supposed she knew what the papers meant when she signed them, she replied that Mr. Moore was her lawyer and would not ask her to do anything wrong, and thereupon she acknowledged the discharge of the old mortgage and the assignment of the new one each to be her free act and deed. Moore at that time was an attorney at law in good standing, and this made it reasonably prudent for the plaintiff to entrust him with her money and business.

The same fact, with the added circumstances that she had placed in his hands the mortgage note indorsed in blank by herself and all the documents necessary to transfer to the trust company an apparently perfect title to the note and mortgage as a first mortgage, including acknowledgments made by her, made it reasonably prudent for the trust company and the other defendants to deal with Moore on the footing that he had authority to assign the note and mortgage and to receive the purchase price. We see nothing in the circumstances to put either of the defend-



ants upon further inquiry. If there was anything which under the circumstances could be characterized as negligence, it was upon the part of the plaintiff herself in executing papers without knowing their contents and purpose, and without asking for or receiving information as to them, and in going on with her acknowledgment of the discharge and the assignment after she herself had noticed that the assignment contained the name of a corporation with which, so far as she knew, she had nothing to do.

The case therefore is one in which she has entrusted voluntarily to an agent selected by herself documents, one of which was a negotiable note indorsed by herself in blank and so made transferable by delivery, of such a nature as to enable the person so entrusted with them to divest her of the apparent title to the note and mortgage in favor of the trust company, and for the benefit of Kaufman and Bilosky, no one of whom is shown to have been acting out of the ordinary course of business. The purchase and sale of mortgages is not at all an unusual transaction. The plaintiff shows no reason why there should be shifted from her to the defendants the loss occasioned by Moore's dishonesty, and made possible by her own active participation in the execution and direct acknowledgment of the papers.

The cross bill brought by Logan remains to be considered. Although this is called a cross bill, yet it does not seek any relief by way of defence to the original bill, but sets out a case which entitles Logan to affirmative relief, namely, to have delivered to him the first note which he gave to Mrs. Callahan. This relief he needs, even if the original bill be dismissed. In such a case the cross bill may be retained and a decree granting relief may be entered as if it were an original bill. *Holgate v. Eaton*, 116 U. S. 83. *Dawson v. Amey*, 13 Stew. 494. *Sigman v. Lundy*, 66 Miss. 522. *Worrell v. Wade*, 17 Iowa, 96. See other cases cited in Dan. Ch. (5th ed.) 1553, note 3, and cases cited in Story, Eq. Pl. § 399, note a.

The master has found that Logan applied to Mrs. Callahan for a loan of \$5,000 upon real estate and that she, having agreed to make the loan, employed Moore as her attorney to look up the title, prepare and attend to the execution and recording of the



papers, and pay over the money to Logan. As the building on the premises was in process of construction the agreement was made with her knowledge for a temporary mortgage upon which the money could be paid to Logan from time to time as the building progressed, and when it was completed a new mortgage for three or five years was to be executed by him to her to take the place of the temporary loan. Under these and further facts found by the master we are of opinion that the delivery of the new mortgage by Logan to Moore was a delivery to the defendant in the cross bill, and that Logan upon such delivery was entitled to the return of the old note and the discharge of the old mortgage. The order must be

*Bill dismissed ; in cross bill decree for the plaintiff Logan.*

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EDWIN P. BLACKMAR vs. SILAS W. NICKERSON.

Norfolk. January 9, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Officer. Search Warrant.*

If a police officer, having a search warrant for intoxicating liquors in a certain house, goes there in the absence of the owner and takes away a safe, and if afterwards, on the refusal of the owner to open the safe, the officer causes it to be opened by an expert who breaks the lock, using no more force than is necessary, and if the officer finding in the safe none of the liquor described in the warrant returns it to the owner, the officer is liable to the owner in an action of tort for removing the safe and breaking it open without the owner's consent.

MORTON, J. This is an action of tort for entering the plaintiff's premises and taking and carrying away an iron safe and breaking it open and rendering it worthless. The defendant was a police officer and sought to justify under a warrant to search the plaintiff's premises for intoxicating liquor. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge of the Superior Court to give certain rulings that were asked for.



The warrant gave the defendant the right to enter the plaintiff's premises and search them and remove any of the liquors described in it and found there, with the casks and other vessels in which it was contained, and all implements of sale and furniture used or kept and provided to be used in the illegal keeping or sale of such liquor, and carry them to a place of safety and keep them until final action was had thereon. R. L. c. 100, § 75. Acting under his warrant the defendant entered the premises and proceeded to search for the liquor described in it. He found the safe, but neither he nor the plaintiff's wife, the plaintiff being absent, could open it. Thereupon, according to his testimony, he told her that he should have to break it open, and she requested him not to do so, but to remove it to some safe place until her husband's return, when he would open it for him. This alleged conversation was denied by the wife. The defendant did not then break the safe open but removed it to his own dwelling house. On the return home of the plaintiff the defendant went to him and requested him to open the safe, which the plaintiff refused to do until he could see his counsel. Upon the plaintiff's refusal to open the safe the defendant procured an expert to open it. The expert broke the lock, and the defendant, after examining the safe sufficiently to ascertain that it did not contain any of the liquor described in the warrant, returned it and its contents to the premises from which it had been removed. It was taken away in the evening of November 27 and returned in the evening of November 29, the 28th being Thanksgiving Day. It was not claimed that any unreasonable force was used in opening the safe, or that the defendant kept it longer than was reasonably necessary to obtain an expert to open it.

The question is whether under the circumstances the defendant had a right to remove and break open the safe. We do not think that he had. He had the right to seize and carry away any of the liquors described in his warrant and the casks and vessels in which they were contained. Whether, if the safe had been used by the plaintiff as a place to store and keep liquors in for sale in violation of law and he had refused to open it, the defendant would have had a right to carry it away and break it open, and whether it could have been confiscated by the court



under the statute, we need not consider. It was not so used and there is nothing to show that the defendant had any evidence tending to show that it was so used. In the discharge of his duty, under the warrant, to search the premises the defendant could have left the safe in the charge of a keeper for a reasonable time to await the plaintiff's return and then upon the plaintiff's refusal to open it have caused it to be opened. Perhaps, if the plaintiff had objected to the presence of a keeper, the defendant could have removed the safe and then have opened it. But nothing of the sort occurred, and the removal was, we think, clearly unjustifiable. Whether, if the safe had been removed by the defendant in the plaintiff's absence with the consent of his duly authorized agent to await the plaintiff's return, the defendant on the plaintiff's refusal to open it then could have broken it open, we need not consider. No such question appears by the bill of exceptions to have been raised at the trial by any of the instructions that were requested and refused. If in fact raised, and the question was left to the jury, then the verdict of the jury must be taken to have settled the question of such consent adversely to the defendant. The cases of *Jones v. Root*, 6 Gray, 435, and *Androscoggin Railroad v. Richards*, 41 Maine, 233, relied on by the defendant, are plainly distinguishable.

*Exceptions overruled.*

*G. W. Wiggin & O. T. Doe*, for the defendant.

*H. E. Ruggles*, (*J. B. Crawford* with him,) for the plaintiff.

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JOHN BURKE vs. PATRICK J. COYNE.

Middlesex. January 18, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.

*Mechanic's Lien. Contract, Implied: common counts.*

One who has furnished labor and materials for a building under an express contract with the owner, if he has failed to perform the contract substantially, cannot establish a lien under R. L. c. 197, for the value he has added to the real estate of the owner by the labor and materials he has furnished, as he could if he had performed the substance of the contract.



PETITION, filed March 26, 1902, under R. L. c. 197, to establish a lien to the amount of \$698.37 on a three apartment house of the defendant on Holworthy Street in Cambridge for labor performed and materials furnished in doing the plumbing work for the building under a contract between the petitioner and the respondent requiring compliance with certain plans and specifications.

In the Superior Court the case was tried before *Bell, J.* Seven issues to the jury were framed, the first three of which only are material to the exceptions. Those issues with the answers of the jury were as follows:

"1. Did the petitioner and the respondent make a contract concerning the labor and materials mentioned in the petitioner's account, and if so, what was the amount of said contract?"

"Yes, \$698.37."

"2. Did the petitioner perform the contract?" "No."

"3. If the petitioner did not perform his contract, what was the value of the labor and materials which he furnished?"

"\$625."

The judge construed the second issue to mean, "Did the petitioner substantially perform his contract," and on this point instructed the jury that if the petitioner had not performed his contract the law allowed him to recover something if he had acted in good faith, and that he was entitled to recover the value of his work to the owner of the property.

The judge ruled as stated in the opinion, and found for the petitioner in the sum of \$625, "which was the amount the jury found that the petitioner's work had added to the value of the respondent's estate," and ordered that a lien be established and that an order of sale issue. The respondent alleged exceptions.

*A. J. Daly & F. J. Carney*, for the respondent.

*J. H. Vahey, C. H. Innes & P. Mansfield*, for the petitioner.

BRALEY, J. If the petitioner had fully performed the entire contract made with the respondent he could have established a lien for labor performed and for labor and materials furnished under it. But the parties were at issue over this question. While the petitioner contended that he had fully carried out his agreement, the respondent contended that there had been a failure to substantially complete it in good faith, because of



a wilful variation from the plans and specifications in many particulars.

The issues framed to cover this dispute were not sufficiently full. For the distinction is apparent between a strict compliance, which was all that was covered by the language used in the second issue, and substantial completion in good faith of the contract. Apparently with the consent of the parties, the presiding judge attempted to cure this defect, and to read into the issue what it lacked to make clear and definite the real question involved, by instructing the jury that it meant, "Did the petitioner substantially perform his contract?" As thus construed and submitted, it was answered in the negative.

From this answer there is but one conclusion to be drawn, which is, that the jury found the petitioner had failed not only to carry out his agreement as to trivial details, but had been guilty of material deviations.

The third issue also was construed to mean an inquiry as to how far the work and materials had enhanced the value of the respondent's estate. Again this is a different inquiry than the ascertainment of the value of the labor and materials furnished. *Gillis v. Cobe*, 177 Mass. 584, 591.

In answer to this question the amount found due was afterwards treated as the sum for which, if at all, a lien should be established.

Under the instructions of the judge, in answer to the third issue, the sum stated represented the amount due the petitioner after allowing to the respondent whatever expenditure was required to supply the omitted work and materials. Or it may be said that the difference between the price named in the contract, and the outlay necessary to remedy defects, measures the value furnished by the petitioner. *Norwood v. Lathrop*, 178 Mass. 208, 210.

In view of the trifling difference between the agreed price and what he is found to have done, it is difficult to see how the jury reached the result shown by their answer to the second issue, unless notwithstanding the instructions they followed its literal wording. Nevertheless, their answer must be treated as conclusive.

The result reached by the answers to the issues as thus inter-



puted, and followed in the final order of the judge, is that although the petitioner materially failed to complete his contract, he is entitled to a lien to the extent of the increased value of the respondent's premises due to the work and materials contributed by him.

After beginning the work there was no abandonment, and he voluntarily went forward until he had accomplished what was claimed by him to be a full compliance with the agreement. But where substantial performance is not found, the general rule that an express contract excludes an implied one covering the same subject controls. *Stark v. Parker*, 2 Pick. 267, 274. *Olmstead v. Beale*, 19 Pick. 528. If he honestly had failed by reason of slight changes of little value, he could not recover on the contract itself, unless it was shown that the plumbing had been accepted, thus waiving any defects. *Wiley v. Athol*, 150 Mass. 426, 435. *Allen v. Mayers*, 184 Mass. 486.

Yet where a special contract is made with the owner to erect a house or other buildings on his land, and the contractor unintentionally fails to fully perform it by reason of unimportant variations, he may recover under a count on an account annexed for the value of the labor and materials, less any deductions necessary to complete the work, but not to exceed the stipulated price. It is no bar to his recovery that there has not been a full performance. *Hayward v. Leonard*, 7 Pick. 181. *Cullen v. Sears*, 112 Mass. 299, 308. *Gillis v. Cobe*, *ubi supra*.

This equitable principle has been applied in petitions to enforce mechanics' liens where similar conditions are shown. *McCue v. Whitwell*, 156 Mass. 205, 207. *Moore v. Erickson*, 158 Mass. 71, 73. *Angier v. Bay State Distilling Co.* 178 Mass. 163, 172. *Moore v. Dugan*, 179 Mass. 153. *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375, 378.

The foundation for this rule, whether applied in an action at law or in a petition to enforce a lien, has been stated to be that the landowner should not be permitted to avail himself of the added value to his property thus furnished without making just compensation. *Hayward v. Leonard*, *ubi supra*.

For these reasons the rulings given that the petitioner could not recover under the provisions of Pub. Sts. c. 191, § 1, unless he proved that in good faith he had endeavored substantially to



perform his contract, were right. But the ruling that even if he had failed to do this a lien could be enforced by him against the respondent's estate for the amount of its increased value due to the labor and materials which he had furnished was erroneous, because it ignored the adverse finding of the jury. *Veazie v. Hosmer*, 11 Gray, 396, 397. *Blood v. Wilson*, 141 Mass. 25. *Homer v. Shaw*, 177 Mass. 1, 5.

*Exceptions sustained.*

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MARY L. SWAIN & another, trustees, vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 8, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Practice, Civil, Exceptions. Boston Elevated Railway Company. Elevated Railway. Damages.*

Exceptions not argued are considered waived.

On a petition under St. 1894, c. 548, § 8, against the Boston Elevated Railway Company for damages to the petitioner's property from the location, construction, maintenance and operation of the respondent's elevated railway, the petitioner is not entitled to damages for any annoyance or injury suffered by the customers of tenants in the petitioner's buildings from their horses being frightened by the operation of the road when driven to the premises, the suffering from this inconvenience being a condition common to all persons driving horses in that vicinity.

No exception lies to a refusal to give an instruction in the language requested if it was given in substance.

PETITION, filed July 9, 1901, under St. 1894, c. 548, § 8, by the owners of land and the buildings thereon numbered from 2364 to 2372 inclusive on Washington Street in that part of Boston called Roxbury, for damages to that property from the location, construction, maintenance and operation of the respondent's elevated railway.

In the Superior Court the case was tried before *Maynard, J.* The jury returned a verdict for the petitioners, assessing damages in the sum of \$6,933; and the respondent alleged exceptions, raising the questions stated by the court and others which are held to have been waived because not argued.



*C. F. Choate, Jr., J. L. Hall & R. A. Stewart*, for the respondent, submitted a brief.

*F. N. Nay*, (*W. N. Swain* with him,) for the petitioners.

**BRALEY, J.** The exceptions of the respondent to the exclusion of certain questions asked one of the petitioners on cross-examination for the purpose of eliciting evidence, that after the road was constructed the value of the estate was enhanced, because the wall of the brick building used before for the display of advertisements, now would be observed by passengers on the trains, and to the instructions to the jury on this branch of the case, have not been argued, and they must be considered as waived.

This leaves as the only question for our determination whether the instruction requested, that the petitioners could not recover damages for any annoyance or injury suffered by the customers of tenants of the buildings from the fright of their horses when driven to the premises, and caused by the operation of the road, should have been given. It is not contended that either by the condition of the property, or the use for which it was fitted, its rental value would substantially be diminished by the possibility that this might occur, and the present case is clearly to be distinguished from *Baker v. Boston Elevated Railway*, 183 Mass. 178.

While, without objection, evidence was introduced that horses had been frightened, such an occurrence cannot be considered upon the evidence as an element of damage for which they were entitled to recover. This inconvenience was general in character, and not confined to those having occasion to trade with the tenants, but was a condition common to all driving horses in that vicinity. *Quincy Canal v. Newcomb*, 7 Met. 276, 283.

An instruction that this circumstance did not diminish the commercial value of the property, but was outside of the liability of the respondent, thus became applicable.

If, however, the request properly could have been given as framed, the refusal to rule in the language requested, when followed by an instruction to the same effect, was all that the respondent rightly could ask, and it has no just ground of exception. *Norwood v. Somerville*, 159 Mass. 105, 112. *Graham v. Middleby*, 185 Mass. 349, 354.

Upon looking at the ruling given, it appears that the jury



were instructed that no recovery could be had for any injury suffered from this cause, and that the damages to be assessed must be confined strictly to acts which made the estate less available for the use to which it was adapted.

*Exceptions overruled.*

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WHITE SEWING MACHINE COMPANY vs. PHENIX NERVE  
BEVERAGE COMPANY.

Suffolk. March 9, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Evidence, Remoteness. Practice, Civil, New trial. Jury and Jurors.*

On the issue of damages in an action for injuries to an automobile belonging to the plaintiff which was partially destroyed while in the possession of the defendant, it appeared, that after the machine had been returned to the plaintiff in its damaged condition it was sent as freight to Cleveland, Ohio, where seven months later it was examined by mechanical experts whose depositions as to the extent of the damage were admitted in evidence. The defendant excepted to the admission of the depositions on the ground that the plaintiff had not shown that the condition of the machine remained the same during the seven months before the examination. *Held*, that the plaintiff having shown the state of the machine when received from the defendant and when shipped to Cleveland, and there being no suggestion by the defendant of any change before the examination, the jury would be warranted in drawing from the whole evidence the inference of fact that the machine when seen and examined by the experts was in all respects unchanged.

On a motion for a new trial a finding of the presiding judge that two of the jurors, alleged to have been asleep, were awake during the whole trial and that no material portion of the evidence escaped their attention, is final.

CONTRACT by a corporation manufacturing automobiles against the lessee from it of an automobile delivery wagon, for injuries to the machine which was partially destroyed by fire while in the possession of the defendant. Writ dated October 5, 1903.

At the trial in the Superior Court before *Schofield, J.* the jury found for the plaintiff in the sum of \$976.23; and the defendant, after a motion for a new trial which was denied by the judge, alleged exceptions, raising the questions stated by the court.

*H. T. Richardson*, for the defendant, submitted a brief.

*C. W. Rowley*, for the plaintiff.



BRALEY, J. This is an action to recover the value of an automobile partially destroyed by the defendant's negligence while in its possession under a contract of rental with an option of purchase.

After the machine had been returned to the plaintiff at Boston it was sent on August 7, 1903, as freight, to Cleveland, Ohio, where, some time in March, 1904, it was examined by mechanical experts, whose qualifications were admitted. But the defendant excepted to the admission of their depositions giving an opinion of its value because no testimony had been offered by the plaintiff that its condition remained the same during the intervening period.

Having shown the state of repair when received and shipped, and there being no suggestion by the defendant of any change before the examination, the presumption which might be drawn from the whole evidence, that the automobile seen and examined by the experts was in all respects unchanged, presented a question of fact. *Leighton v. Morrill*, 159 Mass. 271, 278.

The length of time, the means of transportation used, the improbability of any intermeddling, the correspondence in their description of it by the experts, with similar evidence of the defendant's witnesses, were circumstances affecting the force of the presumption, but did not as matter of law require the withdrawal of the case from the jury to whose determination it was properly submitted under correct instructions. *Laplante v. Warren Cotton Mills*, 165 Mass. 487, 489. *Dronney v. Doherty*, 186 Mass. 205, 207.

The remaining exception is to the denial of the defendant's motion for a new trial which was asked for because of the alleged misconduct of two of the jurors in falling asleep while the case was on trial before them.

No doubt the defendant was constitutionally entitled to the intelligent judgment of each member of the panel. If part of the evidence was lost by the sleeping jurors this might be prejudicial to him in obtaining such result, and furnish ground for the granting of a new trial. But whether he suffered any wrong from this cause depended upon the fact whether they were asleep. This was a question of fact on which the presiding judge finds, upon the evidence submitted at the hearing on the



motion, that they neither slept, nor did any material portion of the evidence, or of his instructions, escape their attention.

This finding, although not open to review by us, appears to have been amply justified, and is decisive. *Schendel v. Stevenson*, 158 Mass. 351. *Olivieri v. Atkinson*, 168 Mass. 28, 30. See also *Stone v. St. Louis Stamping Co.* 156 Mass. 598, 600.

*Exceptions overruled.*

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### FRANKLIN SQUARE HOUSE vs. CITY OF BOSTON.

Suffolk. March 9, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

#### *Tax. Charity.*

A corporation organized under Pub. Sts. c. 115, "to provide a home for working girls at moderate cost," having no capital stock, and none of the income or profits of its business being divided among its members, can be found to be a charitable institution within the meaning of R. L. c. 12, § 5, cl. 3, and its property therefore to be exempt from taxation under that clause.

BARKER, J. The petitioner is a corporation organized under Pub. St. c. 115, "to provide a home for working girls at moderate cost." The petition is for the abatement of a tax assessed on the land and building of the corporation. It was tried without a jury, and the presiding judge upon facts either agreed to by the parties or found by him at the hearing found and ruled that the petitioner was entitled to an abatement, and reported the case for our decision. The tax was assessed as of May 1, 1903, and the question in the court below was whether the petitioner had shown that its property was exempt under the provisions of R. L. c. 12, § 5, cl. 3, concerning the property of literary, benevolent, charitable and scientific institutions. The decision of the trial judge was that upon the facts stated in the report the petitioner's property was exempt. The present question is whether it appears as matter of law that that decision was wrong. See *New England Theosophical Co. v. Assessors of Boston*, 172 Mass. 60.



This court has often considered the meaning of the words "benevolent" and "benevolence." See *Saltonstall v. Sanders*, 11 Allen, 446, 465-471; *Rotch v. Emerson*, 105 Mass. 431; *Chamberlain v. Stearns*, 111 Mass. 267; *Suter v. Hilliard*, 132 Mass. 412; *Massachusetts Society for the Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24; *Young Men's Protestant Temperance & Benevolent Society v. Fall River*, 160 Mass. 409; *New England Theosophical Co. v. Assessors of Boston*, *ubi supra*. It never has decided whether every benevolent institution, to be entitled to the exemption, must also be charitable. *Young Men's Protestant Temperance & Benevolent Society v. Fall River* and *New England Theosophical Co. v. Assessors of Boston*, *ubi supra*.

It is not necessary in the present case to decide that question if upon the facts stated in the report the purpose and work of the petitioner in furnishing a home for working girls at moderate cost fairly could be found by the court below to have been charitable.

In the present conditions of life there is a large class of young women who have no homes of their own, and who must work hard and suffer privation. Though not paupers, they are so poor as to make it a work of charity to provide for them a home. The individuals of the class change from day to day. They are sufficiently numerous and so a part of the public, and are so connected with it and with the public welfare as to give to the work of providing a home for any individuals comprised in the class that quality of indefiniteness in the persons helped, which with the charitable purpose aimed at makes a public charity in the legal sense. The work is entirely analogous to that of the "supportation, aid and help of young tradesmen [and] handicraftsmen," recognized in the statute of charitable uses as one species of a public charity. St. 43 Eliz. c. 4.

So far as the petitioner has allowed its property incidentally to be used to give temporary shelter to other women than those of the class to which its work is specially devoted, its operations are shown by the facts stated in the report to have had the qualities of charity in the legal sense, and do not militate against a finding that the petitioner has acted exclusively as a charitable society. It has no capital stock, and none of the income or profits of its business is or can be divided among members,



or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes.

The occupation of the property is that of the corporation itself, and not of those to whom it affords a home, just as the occupation of a college dormitory or refectory is that of the institution of learning rather than that of its students, and is for the exact purpose for which the petitioner was incorporated, rather than for the private purposes of the inmates of the home.

Upon the facts stated it cannot be said that the judge erred in law in finding and ruling that the petitioner was entitled to an abatement and to judgment in the sum stated in the report. See *Minns v. Billings*, 183 Mass. 126.

*Judgment is to be entered for the petitioner in accordance with the report.*

*F. A. North, (J. P. Russell with him,) for the petitioner.*

*P. Nichols, for the respondent.*

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FRANCES CONROY vs. BOSTON ELEVATED RAILWAY  
COMPANY.

Suffolk. March 10, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Street Railway. Carrier. Negligence.*

One who has alighted from an electric street car, upon a reserved space of grass in the centre of a street over which the tracks of the street railway are laid, has ceased to be a passenger of the railway company operating the car, and while crossing the reserved space after alighting has only the rights of a person lawfully upon the street.

TORT for injuries from falling over one of the rails of a track of the defendant on Columbia Road opposite Wolcott Street in that part of Boston called Dorchester, after the plaintiff had alighted from a car of the defendant and was crossing the reserved space of grass in the centre of that road over which the tracks of the defendant are laid, the reserved space being under the care, control and management of the park department of the



city of Boston. Writ in the Municipal Court of the Roxbury District of the City of Boston dated July 10, 1902.

On appeal to the Superior Court the case was tried before *Schofield, J.*, without a jury. He found for the defendant as stated in the opinion; and the plaintiff alleged exceptions.

*M. L. Jennings*, for the plaintiff.

*C. S. French*, for the defendant, was not called upon.

*BARKER, J.* That part of the defendant's railway with which this action is concerned was in a public way the control of which was in a board of park commissioners. The railway tracks were in the centre of the street in a reserved space from which horses and ordinary teams and vehicles were excluded but which was open to the use of the public on foot. After alighting from a car the plaintiff walked upon this reserved space a few feet to a point behind the end of the car and then attempted to walk across the part of the street occupied by the tracks. She fell over one of the rails, and was injured.

The suit is in tort to recover compensation for her injuries. It was tried without a jury, and with a finding for the defendant is here upon exceptions taken by the plaintiff to the refusal of the presiding judge to give certain rulings.

All that we deem it necessary to say in overruling the exceptions is that when the plaintiff left the car she ceased to be a passenger; *Creamer v. West End Street Railway*, 156 Mass. 320; that the fact that the part of the street where the tracks were laid was not allowed to be travelled by ordinary vehicles imposed upon the defendant with reference to those persons who had been or might be its passengers no duties other than those which a street railway is under because of its location in any street; and that if under the declaration the case could be treated as one to recover compensation because of a want of repair or defect in some portion of a highway, which for some reason the defendant was bound to keep in repair, the bill of exceptions does not show that the presiding judge was bound to find the rail a defect or that there was any defect.

*Exceptions overruled.*



## CASPAR BERRY &amp; another vs. JEAN B. PELNEAULT.

Suffolk. March 13, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Partnership.*

Participation in the profits of a firm is evidence that the person so participating is a partner, and that the persons managing the business of the firm are his agents.

CONTRACT, on an account annexed, for the price of intoxicating liquors alleged to have been sold to the defendant. Writ dated February 7, 1903.

At the trial in the Superior Court before *Schofield*, J. the judge refused to order a verdict for the defendant, and submitted the case to the jury. The jury returned a verdict for the plaintiffs in the sum of \$230.90; and the judge reported the case for determination by this court. If upon all the evidence the case should have been submitted to the jury, and if the verdict could be sustained, judgment was to be entered for the plaintiffs for the amount of the verdict and interest from March 25, 1904; otherwise, the verdict was to be set aside, and final judgment was to be entered for the defendant.

*O. Storer*, (*R. H. Benny* with him,) for the defendant.

*E. F. McClennen*, (*H. F. Lyman* with him,) for the plaintiffs.

BARKER, J. The contention that the sale which created the debt sued on was illegal is not argued and we treat it as waived.

The only question is whether there was any evidence that the defendant was a partner in the firm which bought the goods.

There was abundant evidence that from the beginning of the firm until after the debt sued on had been contracted the defendant was entitled to receive and had one half of the profits of the firm weekly less a small sum. Participation in the profits of a firm is evidence that the person participating is a partner, and that the persons managing the business are his agents. *Eastman v. Clark*, 53 N. H. 276. Whether the explanation testified to by the witness, that the defendant did not share in the profits as profits, but took them merely under the right of one of



the partners who was his debtor and only as payment of his debt, was true or not was for the jury. There was testimony of contradictory statements on a previous occasion tending to discredit the testimony to that effect of at least one of the witnesses. The jury might well disbelieve the explanation. We have no occasion to discuss the question whether if the explanation stated by the witnesses was true the defendant could have been held as a partner.

*Judgment for the plaintiffs on the verdict.*

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LAWRENCE J. LOGAN vs. BOSTON ELEVATED RAILWAY  
COMPANY.

Suffolk. March 14, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Boston Elevated Railway Company. Damages. Evidence, Opinion: experts.*

A petitioner under St. 1894, c. 548, § 8, for damages from the location, construction, maintenance and operation of the elevated railway of the Boston Elevated Railway Company, is entitled to recover for injury to his property not only from noise caused directly by the operation of the elevated trains but also for injury from the increase of noise in the operation of the surface cars under the elevated structure caused by the existence of that structure.

On the trial of a petition under St. 1894, c. 548, § 8, for damages from the location, construction, maintenance and operation of the elevated railway of the Boston Elevated Railway Company, an expert who has given his opinion in regard to the amount of damage to the petitioner's property, may be permitted to testify that the building of the elevated railway had diminished the salability of property along the line, this being admitted as the statement of an effect which related to the petitioner's estate as well as to others, in support of the witness's previously expressed opinion on the subject of damages.

PETITION, filed November 12, 1901, by the owner of a parcel of land with the buildings thereon on Washington Street at the corner of Eustis Street in Boston, under St. 1894, c. 548, § 8, for damages from the location, construction, maintenance and operation of the elevated railway of the Boston Elevated Railway Company.

At the trial in the Superior Court before *Holmes, J.* the jury returned a verdict for the petitioner, and assessed his damages



in the sum of \$5,750. The respondent alleged exceptions to the admission of certain evidence described in the opinion.

*P. H. Cooney*, (*L. F. Hyde* with him,) for the respondent.

*S. C. Brackett*, (*J. Walsh* with him,) for the petitioner.

KNOWLTON, C. J. This bill of exceptions presents two questions in regard to the admission of evidence. The suit was brought to recover damages to property caused by the location, construction and operation of the Boston Elevated Railway, under the St. 1894, c. 548. On the street opposite to the petitioner's house is the defendant's elevated structure, twenty-five feet in width, upon which are two tracks. Underneath this structure are two tracks of a surface railway over which cars are constantly passing. We understand that the surface tracks were there before the elevated railway was built. A duly qualified expert witness was allowed to testify that the construction of this railway over the surface tracks increased the noise at the plaintiff's house on the side of the street, caused by the cars running over the surface railway. It is conceded that noise from the elevated railway is one of the elements of damage to the petitioner's property, under the St. 1894, c. 548. *Baker v. Boston Elevated Railway*, 183 Mass. 178, 181, 182. Upon this branch of the case, it makes no difference whether the noise is caused by the running of cars upon the elevated structure, or by an increase and aggravation of the sound of the cars running underneath it, on the tracks of the surface railway. The testimony was rightly admitted.

An expert as to the value of real estate, who presumably had given his opinion in regard to the amount of damage to the petitioner's property, was permitted to testify, subject to the respondent's exception, that the building of the elevated railway had diminished the salability of property along the line. We infer that he was asked to give the result of his experience in the real estate market, in support of his previously expressed opinion on the subject of damages. Testimony of a proper kind, to show the reasons for the opinion of an expert, is often introduced to give weight to his opinions and to make them intelligible. *Sexton v. North Bridgewater*, 116 Mass. 200, 207. *Dickenson v. Fitchburg*, 13 Gray, 546.

The effect of the respondent's taking and use of the easement



upon the market value of the petitioner's property was the subject which the jury were investigating. On this subject, the state of the market in reference to such property, so far as it seemed to be produced by the construction and use of the railway, was a proper matter for their consideration. *Lawrence v. Boston*, 119 Mass. 126. *Pierce v. Boston*, 164 Mass. 92. The fact that the question was general, including the effect upon similarly situated property other than the petitioner's, is immaterial. The testimony was introduced for its bearing upon the estate in question. It was a statement of an effect which relates to this estate as well as to others. In the opinion of a majority of the court the entry should be

*Exceptions overruled.*

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MARY L. BROOKS, administratrix, vs. BOSTON AND MAINE  
RAILROAD.

Middlesex. March 14, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence. Railroad.*

It is not the duty of a railroad company to construct and maintain its gates at an ordinary crossing on the main street of a town of sufficient strength to withstand a runaway horse dashing against or rearing over them.

TORT by the administratrix of Edward F. Brooks for personal injuries to the plaintiff's intestate resulting in his death alleged to have been caused by the negligence of the defendant's servants in running an engine and cars against a team owned and driven by the intestate, at the Main Street crossing of the defendant's railroad in Reading early in the afternoon of June 7, 1902. Writ dated September 16, 1902.

In the Superior Court *Bell, J.* ordered a verdict for the defendant; and the plaintiff alleged exceptions.

*W. M. Lindsay*, (*C. K. Darling* with him,) for the plaintiff.

*F. N. Wier*, for the defendant, was not called upon.

KNOWLTON, C. J. The plaintiff's intestate and two children who were riding with him were run over and fatally injured at



a street crossing of the defendant's railroad in Reading. Some of the circumstances attending the accident are stated in the bill of exceptions as follows: "While on the main street, and some mile or mile and a half from the grade crossing in question, the horse driven by Mr. Brooks became frightened. When within about five hundred and seventy feet of the Main Street crossing, a witness testified substantially that he saw Mr. Brooks pulling on the reins of his horse and calling out 'Whoa! whoa!' At this time the horse had his head down, was running very fast and the bits appeared to be between his teeth; that from this point down to the time that the team got to the Main Street crossing Mr. Brooks was pulling on the reins and talking to his horse. One witness testified that the horse when within one hundred feet of the crossing had come down to a trot but had the appearance of having run away. When within twelve or fifteen feet of the gates, which were down, the horse turned and swerved sharply to the left, ran along even or parallel with the gate arms, lunging and rearing. Another witness testified that she saw Brooks pull the horse over to his left when he was within twelve feet of the gate and that he was coaxing him to be quiet. When the horse came to that portion of the gate arm which was braced the most, and which rested or rocked on the iron standard or gate post, the horse went against the gate arm, or reared over it, breaking the gate arm short off, and the gate arm, horse, carriage and occupants pitched right over on to the railroad between the rails of the south bound track, and in a few seconds the train of the defendant came along, struck the team and caused the injury complained of. . . . The evidence shows that the gates were down when the plaintiff's intestate passed a house about five hundred and seventy feet from the crossing. . . . A view of Main Street in the direction from which the team in question came could be seen for nearly a mile as one stood in or upon the highway on the location at Main Street."

We will assume in favor of the plaintiff, without deciding, that there was evidence from which the jury might have found that her intestate was in the exercise of due care. The important question in the case is whether there was any evidence that the accident was caused by negligence of the defendant. The



weight of the evidence is in favor of the defendant's contention that the signals required by the statute were given as the train approached the crossing, although perhaps there was evidence upon which that question might have been submitted to the jury. It was an undisputed fact that the gates were down a considerable time before the horse reached the crossing, thus giving to the driver full information that a train was expected, and that he could not safely attempt to cross. It was early in the afternoon, in the full light of day, and the plaintiff's intestate was very familiar with the crossing. If the jury could have found that the bell was not rung continuously for a distance of eighty rods before the train reached the crossing, there was no evidence to warrant them in finding that this neglect caused the accident. The plaintiff's intestate was sufficiently warned that a train was approaching, and he evidently was acting in the belief that he could not cross safely. His horse had been frightened by an automobile, and could not be controlled. The train which struck him was a passenger express, running on a slightly descending grade, at a rate of speed which was estimated by different witnesses differently, the engineer giving it at thirty to thirty-five miles an hour, and some calling it forty to fifty miles an hour. There is nothing to show that the accident was caused by running the train at an excessive rate of speed. Seemingly the rate was not greater than is usual for express trains in the country, and if it had been less there is nothing to indicate that the accident would have been avoided. The engineer could not see the horse and carriage until he was almost upon them.

It is contended that the gates were not so strong as they should have been; but the evidence shows that they were "the usual ones erected at independent crossings," and there was no evidence that, for such places as this, any other kind would be better. As was said in *Marks v. Fitchburg Railroad*, 155 Mass. 493, 496, "Ordinarily, the principal purpose of gates is effectually to warn travellers not to cross." While in peculiar situations considerable strength may be desirable, it is necessary that they should be so light that they can be raised and lowered quickly, with mechanism that can be easily controlled, and it would be unreasonable and impracticable at ordinary crossings



to construct them of such strength as to withstand the force of a runaway team dashing at full speed against them. At a crossing such as the evidence in this case shows, we are of opinion that the defendant was not called upon to maintain gates which would successfully sustain such a shock as this gate yielded to. It is to be noticed that there was no evidence of a defect or want of repair in the gates, but the contention is that the kind of gate should have been different from that in common use. In *Marks v. Fitchburg Railroad*, 155 Mass. 498, the facts which were held to require the submission of the evidence to a jury were materially different from those now before us.

It also is contended that the company was negligent in not having a gateman or flagman on the ground at the crossing, instead of operating the gates by an attendant in a tower, who at the same time by the same movement operated another gate at another crossing, one hundred and twenty feet away. We are of opinion that this contention is not well founded. The gates were operated effectually, and proper warning was given in this way. If there had been a gateman on the ground, it is difficult to see what he could have done to avert this accident. Gatemen are not employed to place themselves in front of runaway horses for the purpose of stopping them. An attempt of this sort is more likely to be harmful than otherwise.

This lamentable accident happened from causes for which the defendant was not responsible, and against which it was not called upon to make such provision as to render an injury impossible. It was, under the law, to take proper precautions for the safety of travellers on the highway, having reference to all the conditions and probabilities to be anticipated.

We discover in the bill of exceptions no evidence of negligence on the part of the defendant or its servants which was a direct and proximate cause of the accident.

*Exceptions overruled.*



MARGARET L. EDGAR, administratrix, vs. NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Plymouth. March 14, 15, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence, Employer's liability. Railroad.*

In an action under the employers' liability act by the administratrix of a brakeman on a freight train of the defendant for the conscious suffering and death of the plaintiff's intestate, it appeared, that when the train arrived at the freight yard at one end of its route it passed under the control of a switching crew employed in the yard and that the conductor of the freight train and the intestate had nothing to do until the switching engine gave a signal by whistles that the work of the switching crew was done, that, while the switching crew still was making up the train and before the signal had been given, the conductor of the train ordered the intestate to go in between two freight cars to couple the air hose, which was a part of the intestate's duty, and assured the intestate that he would "look out for him," and that in obeying this order the intestate was injured by reason of a switching engine backing down upon the train with other cars. There was evidence which warranted a finding that it was a general practice for the conductor to order his men to go in and couple the hose between such cars as had been coupled together although the train had not been fully made up and the switching engine had not ceased its work. *Held*, that the jury might find that the accident was due to the negligence of the conductor in giving the order and failing to notify the intestate of the approach of the switching engine, and might find that the negligent act was within the scope of the duty entrusted to the conductor as a person in charge of a train, as they properly might infer from the evidence that the general practice of ordering the coupling of the air hose before the train was fully made up was known to the managing officials of the defendant and was approved by them.

TORT, by the administratrix of the estate of Hugh R. Edgar, under R. L. c. 106, §§ 71, 72, for the conscious suffering and death of the plaintiff's intestate, a brakeman on a freight train of the defendant, from a switching engine backing down with other cars upon the train on which the intestate was a brakeman while he in obedience to an order of the conductor in charge of the train was between two cars for the purpose of coupling the air hose. Writ dated January 16, 1904.

At the trial in the Superior Court *White*, J. ruled that, upon all the counts not charging negligence of the conductor of the train crew of which the deceased was a member, the plaintiff was not entitled to recover, and submitted the case to the jury



upon the question of the negligence of the conductor of the train crew.

The jury returned a verdict for the plaintiff in the sum of \$4,000, and awarded \$750 to be paid to the legal representatives of Hugh R. Edgar, and \$3,250 to be paid to Margaret L. Edgar as his widow. The defendant alleged exceptions.

*F. S. Hall*, for the defendant.

*T. H. Buttiner*, (*W. G. Harrington* with him,) for the plaintiff.

HAMMOND, J. Edgar, the plaintiff's intestate, was "head end brakeman," working upon a freight train which ran from Boston to Fall River and return. When the train reached Fall River he uncoupled the locomotive, and a switching crew employed in the freight yard took charge of the train, distributing the cars upon different tracks. When this work had been completed, this same crew proceeded to make up a freight train, taking cars from different tracks, which, when made into a train, were to be hitched to the locomotive that brought down the train upon which Edgar worked, and were to be hauled to Boston. Edgar was to act as brakeman on this train.

The switching crew consisted of a conductor, engineer, fireman and brakeman, no one of whom went upon the train upon which Edgar worked, their duties being confined solely to distributing and uniting cars in the freight yard. Except as hereinafter stated, the men employed upon the freight train running from Boston to Fall River and return had nothing to do in the freight yard until the switching engine gave a signal by whistles that the work of the switching crew was done and that the train was ready for the locomotive.

Edgar was injured while the switching crew was making up this train, and before the signal was given that the train had been made up. He went in between two freight cars to couple the air hose. It was a part of his duty to couple the hose, but the defendant contends that the duty did not arise until the train had been fully made up.

The evidence tended to show that Edgar went to couple the hose in obedience to an express order from Babbin, the conductor of the freight train, coupled with an assurance from Babbin that he would "look out for him," and that the accident was attributable to the negligence of Babbin in giving the



order and in failing to notify Edgar of the approach of the switching engine. We do not understand the defendant to contest the proposition that the jury properly might find that in this way the accident was attributable to the negligence of Babbin.

The defendant, however, stoutly maintains that if there was such a negligent act on the part of Babbin it did not come within the scope of the duty entrusted to him as a person in charge of a train. It contends that by the terms of his employment his duty ended when his train was delivered at the freight yard; that another person was then provided as superintendent until the return train was completely made up, and that Babbin had nothing whatever to do with the making up of this train, or with the train while it was being made up.

The evidence bearing upon this contention is somewhat conflicting, but upon a careful perusal of it we are satisfied that it warrants a finding that it was the general practice for Babbin to order his men to go in and couple the hose between such cars as had been coupled together although the train had not been fully made up and the switching engine had not ceased its work; in a word, that to save time the operations of the switching crew in coupling the cars, and of the freight crew, of which Edgar was a member, in coupling the hose, went on together, and that such was the usual practice. The jury properly might infer that this general practice was known to the managing officials of the defendant and was approved by them, and consequently that in giving the order and the assurance at the time he did, Babbin was acting within the scope of his duty as superintendent.

We are also of opinion that, having as superintendent given the order coupled with an assurance of protection, the duty of using due care to make good the assurance rested upon him as superintendent, and Edgar had the right to rely upon his performance of that duty. *Davis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 532.

*Exceptions overruled.*



**JOHN B. DECHENE vs. GREENFIELD AND TURNERS FALLS  
STREET RAILWAY COMPANY.**

Suffolk. March 15, 16, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence, Contributory, of one riding bicycle on highway.*

If one riding a bicycle on a highway, which on his left is occupied by the track of a street railway and on his right has been made temporarily unfit for bicycle travel by soft material recently put upon it, is proceeding with four other bicyclists riding in single file on a pathway less than two feet in width next to the nearer rail of the track, worn smooth by bicycles although not designed for their use, and if so proceeding he sees an open electric car approaching at a rate of speed of from ten to twenty miles an hour and failing to turn to the right in time one of the wheels of his bicycle is struck by the running board of the car throwing him off, he cannot be found to be in the exercise of due care so as to be entitled to maintain an action against the street railway company for injuries thus caused.

TORT for personal injuries incurred as stated in the opinion, while the plaintiff was riding a bicycle on a highway in the town of Montague on October 4, 1896, from his bicycle being struck by an open electric car of the defendant. Writ dated January 11, 1901.

In the Superior Court *Hitchcock*, J. refused to order a verdict for the defendant, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$7,500; and the defendant alleged exceptions.

*F. L. Greene*, for the defendant.

*H. C. Long*, (*G. T. Morgan* with him,) for the plaintiff.

BARKER, J. The plaintiff sues for personal injuries alleged to have been received on October 4, 1896. His writ was not brought until January 11, 1901. He was riding a bicycle and was thrown from it by coming into collision with one of the defendant's open cars of the usual construction. His theory of the accident is that as he was changing his direction to avoid a collision the running board of the car struck the rear wheel of his machine and that by force of the blow he was thrown upon the car with his head and the upper part of his body lodged between two seats and the lower part of his body hanging out of the car



upon and over the running board. The defendant's evidence tended to show that the front wheel of the bicycle wobbling in the sandy road as the car was passing struck the running board and that the plaintiff was thrown into the soft sand and gravel of the roadway and did not come in contact with the car, and that he again mounted the bicycle and rode away, and that the bodily ills under which he suffered were not the result of any accident but were due to an apoplectic seizure and other ailments.

There was no dispute that the railway track was on the extreme left side of the location of the highway as the plaintiff was travelling, nor that the part of the highway devoted to ordinary travel was sixteen or more feet wide to the right of the track, and that the highway was then in use only by the car and by four other bicyclists who until the moment of the accident had been riding in single file near each other, upon a kind of pathway not designed for bicycles but made smooth by their use. This smooth path was next to the rail which was nearer to the path of ordinary travel. It was two feet or less in width and the plaintiff and the others of the party of bicyclists were riding with the wheels of their machines close to the rail. New material had recently been placed upon the carriage path, and this new material was so soft and so thrown into ridges by teams as to make it unfit for bicycle travel. The highway was substantially straight so that the approaching car was in plain sight for about a thousand feet and it was coming up a slightly rising grade.

The evidence on the part of the plaintiff tended to show that the speed of the car was from ten to twenty miles an hour until it was very near the foremost bicycle, that it then slowed up a little and that as it was opposite the leading bicycle and before the collision the car increased its speed by a mile and a half an hour.

The evidence of the defendant tended to show that at no time was there any increase in the speed of the car and that it was not more than eight miles an hour.

Taking the view of the evidence which is the most favorable possible to the plaintiff we are of the opinion that a necessary inference from it is that the collision was due to the plaintiff's



own want of ordinary care in not seasonably leaving the smooth path where if he remained he must collide with the car. The bicyclists were riding at the rate of about six miles an hour in single file, the plaintiff being only fifteen or twenty feet in the rear of the person next him in front. Assuming with this that as the car passed the bicyclist in front of the plaintiff its speed was increased it is inconceivable that in the fifteen or twenty feet the increase of speed should have been enough to cause a collision if there would have been none if the speed had remained the same. This shows that the collision was due in part at least to the fact that the plaintiff, although the car was in plain sight, and although he knew that to avoid a collision he must turn to the right, did not turn soon enough to avoid a collision at the rate of speed at which he saw it approaching.

We think a verdict for the defendant should have been ordered.

*Exceptions sustained.*

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MICHAEL SHEA *vs.* LEXINGTON AND BOSTON STREET  
RAILWAY COMPANY.

Middlesex. March 16, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence, Contributory, In driving.*

In an action by a farmer for injuries from being thrown from his wagon loaded with boxes, by its hind wheels being struck by a car of the defendant as he was attempting to drive across its track, it appeared that the street was a sparsely settled country highway, that the night was dark but that the road was straight and level for several hundred feet behind him and that there were several electric lights suspended from an arm of a post over the highway, so that the plaintiff had reason to suppose that a motorman of an approaching car would see him and warn him, that on account of the height and width of his load the plaintiff from the seat of his wagon could not see a car behind him, that before starting to cross the track the plaintiff pulled up his horse, who had been travelling about three miles an hour, and stopped "about one half a minute" and listened, but heard no car nor gong, that he started his horse again and turned across the track, when with his horse and the front wheels of his wagon on the track he saw a car within nine or ten feet of him, that he "pushed his horse along" slapping the reins on his back, but the hind wheels of the wagon were



struck by the car and the plaintiff was thrown to the ground. There was evidence that the gong of the car was not sounded. *Held*, that there was evidence of the plaintiff's due care to be submitted to the jury.

TORT by a farmer, about sixty-five years of age, for injuries received on the night of November 3, 1902, while driving an ordinary express wagon loaded with boxes along Trapelo Road in Waltham going toward Woburn Street, from being thrown to the ground by having the hind wheels of his wagon struck by an electric car of the defendant. Writ dated December 16, 1902.

In the Superior Court the case was tried before *Mason*, C. J., who refused to rule that the plaintiff was not in the exercise of due care and could not recover, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$913.60; and the defendant alleged exceptions, which after the death of *Mason*, C. J. were allowed by *Richardson*, J.

*C. A. Hight*, for the defendant.

*P. M. Keating*, for the plaintiff.

HAMMOND, J. On account of the height and width of the load the plaintiff from the seat of his wagon could not see a car behind him. The only way he could use his sense of vision in determining whether there was a car behind him was either to get upon the ground or partly turn his wagon so as to get a view of the track. He did neither, although he could have done either. He gave up his sight and relied solely upon his sense of hearing.

Was this inconsistent with due care on his part? He testified that just before he reached Woburn Street he "pulled up" his horse which previously had been travelling about three miles an hour, and stopped "about one half a minute" and listened to hear whether a car was approaching, but did not hear any car or gong. "When he stopped his horse, the horse was headed slightly toward the track. After stopping . . . the plaintiff started his horse up again and turned across the track, and when his horse and front wheels were on the track he saw a car coming in a westerly direction within nine or ten feet from him. Then he 'pushed his horse along' by slapping the reins on his back, and his horse and front wheels cleared the track and the hind wheels were struck by the car"; and the plaintiff and the other man were thrown from the seat to the ground.



The street was "a sparsely settled country highway." No other vehicles were in the vicinity to interfere with the plaintiff's hearing. The night was dark, but the road was straight and level for several hundred feet behind him, and in the vicinity there were several "electric lights which were suspended from an arm extending from a post" over the highway, and he had reason to suppose that a motorman of an approaching car would see him and warn him. A man in his employ was on the seat with him, and, although a marketman, is not shown to have been asleep, so that two pairs of ears had an opportunity to listen. There was evidence which, if believed, showed that the gong of the car was not sounded.

The defendant strongly argues that it was impossible for the plaintiff to have listened with due care and not to have heard the "swish" of the trolley wire, if nothing else, and so have known that a car was approaching. The jury saw the plaintiff and his employee and heard them testify. The case is somewhat close, but we cannot say as matter of law that under all the circumstances they were not justified in coming to the conclusion that the plaintiff listened carefully, and that his conduct showed due care. See *Kelly v. Wakefield & Stoneham Street Railway*, 179 Mass. 542; *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104.

*Exceptions overruled.*

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CHARLES B. ORTH & others vs. BOSTON ELEVATED  
RAILWAY COMPANY.

DANIEL DONAHUE vs. SAME.

Suffolk. March 17, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence. Street Railway.*

It is evidence of due care on the part of a person who was driving a milk wagon at seven o'clock in the morning, returning from making his deliveries, that, as he approached an intersecting street on which street cars ran and of which his view was considerably obstructed by trees and buildings, he was driving slowly and



that he looked and listened and did not see anything nor hear anything before he started to cross the intersecting street where he was struck by a car.

Evidence that an electric car was moving at a high rate of speed as it approached an intersecting street, where the view of the street on which the car was running was considerably obstructed by trees and buildings, without ringing any warning bell or giving any equivalent signal of the approach of the car, is evidence of negligence on the part of the railway company, which a plaintiff whose team was run into by the car at the crossing has a right to have submitted to the jury if there also is evidence that the plaintiff was in the exercise of due care.

TWO ACTIONS OF TORT, the first by the owners of a horse and milk wagon for injury to that property from a collision with an electric car of the defendant on June 17, 1901, at the corner of Westville Street and Geneva Avenue in that part of Boston called Dorchester, and the second by the driver of the wagon, the servant of the plaintiffs in the first case, for personal injuries from the same collision. Writs in the Municipal Court of the City of Boston dated March 14, 1902.

On appeal to the Superior Court the cases were tried together before *Harris, J.*, who ordered a verdict for the defendant in each case. The plaintiffs alleged exceptions.

*J. F. Cusick*, for the plaintiffs.

*J. E. Hannigan*, (*J. W. Connelly* with him,) for the defendant.

**BARKER, J.** The plaintiff Donahue was driving a milk wagon belonging to the other plaintiffs. On the morning of June 17, 1901, about seven o'clock, having been on the wagon since two o'clock in the morning, and having finished his deliveries he was on his way home. Driving down Westville Street in Dorchester intending to cross Geneva Avenue to go up Topliffe Street which leads out of Geneva Avenue near its intersection with Westville Street, as his team was crossing the railway tracks it was run into by an outward bound street car coming down Geneva Avenue and the team was injured as well as the driver.

At the trial of the actions which were to recover compensation for the injuries so received the plaintiff Donahue testified as a witness, and five other persons who at the time of the collision were near the place where it occurred and who saw the collision were also called in his behalf and testified. There was no other material evidence relating to the question of liability. At the close of the plaintiffs' evidence the presiding



judge ruled that they could not recover and directed verdicts for the defendant. The case is here upon exception to that ruling.

Whether it was right depends upon whether there was evidence of due care on the part of the plaintiff Donahue and evidence of negligence on the part of the defendant's servants who were operating the car.

We have read with care the report of the evidence set out in the bill of exceptions and are of the opinion that the case should have been left to the jury.

It is evident that the view of Geneva Avenue from the part of Westville Street down which Donahue was driving as he approached the avenue was considerably obstructed by trees and buildings, and that to cross the railway tracks and turn into Topliffe Street was to incur the danger of a collision with street cars. Ordinary care on the part of Donahue required of him to proceed slowly, with the danger in mind, and exercising all his powers of observation to appreciate and avoid it.

His own testimony and that of the other witnesses is that he was driving slowly. His own testimony is that as he came down Westville Street he looked and listened and did not see anything and did not hear anything. We think this was enough to require the question of his due care to be left to the jury. Perhaps the crossing was such a dangerous one that ordinary care would have required him also to stop before actually driving upon the crossing and to ascertain positively that no car was approaching. But this cannot be ruled as matter of law, nor can it be ruled as matter of law that it was negligence on the part of his employers to put their team in charge of a man whose work began at such an hour of the night that he might be expected to be sleepy if not asleep when driving home at seven o'clock after having completed his deliveries.

There was much evidence that the car was moving at a fast rate of speed as it approached the intersection of the streets. Such of the eye witnesses as were so placed as to see both the car and the team expected the collision. None of the witnesses heard any gong or bell rung or any other warning given by those in charge of the car of its approach, although all of the witnesses were in positions where if a bell had been rung or



other warning given they naturally would have heard it. The defendant's servants if chosen and instructed with due care should have appreciated that there was danger of collision with teams suddenly appearing at such a crossing. It cannot be ruled as matter of law that it was not negligence for them to drive the car at a fast rate of speed toward the crossing without ringing a warning bell or giving any equivalent signal of the approach of the car. It was for a jury to determine whether there was negligence on the part of the defendant.

The difference in the nature of the locality and in the circumstances which attended the collision distinguishes the case from that of *Saltman v. Boston Elevated Railway*, 187 Mass. 243. See *Kelly v. Wakefield & Stoneham Street Railway*, 179 Mass. 542; *McCarthy v. Boston Elevated Railway*, 187 Mass. 493.

*Exceptions sustained.*



### JAMES BELLINO vs. COLUMBUS CONSTRUCTION COMPANY.

Suffolk. March 17, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.

*Negligence. Proximate Cause. Actionable Tort.*

In an action for the destruction by fire of a temporary building and goods of the plaintiff therein through the alleged negligence of the defendant, it appeared that the defendant was a corporation engaged in the construction of a public work, and that the plaintiff had procured Italian laborers for the defendant's service and had erected the temporary building on land of another person near the work, fitted it with bunks for the workmen to sleep in, and in a part of it kept goods which by an agent he sold to the workmen, that as winter came on the men required a stove and the defendant's foreman, either with or without the knowledge and assent of the plaintiff, put in a stove in which the workmen built fires for themselves with fuel of the defendant, that about one hundred feet away from the temporary building was a storehouse of the defendant in which barrels of oil and gasoline were kept, used by the workmen for filling torches which they required for work in a tunnel, that the workmen helped themselves to the gasoline to use in kindling fires in the stove, and in so using it caused the fire which destroyed the plaintiff's property. It further appeared that the defendant's foreman had told the plaintiff's agent that he must stop the kindling of fires with gasoline and directed the employee in charge of the gasoline to prevent the workmen from getting it to use in the stove. *Held*, that, assuming that the act of the defendant's foreman in putting in the stove was not



assented to by the plaintiff and might be treated as an uncondoned trespass, this was the remote and not the proximate cause of the destruction of the plaintiff's property by fire, and that if the defendant was negligent in keeping the gasoline in barrels in a storehouse one hundred feet away and not under lock and key, this also was not the direct cause of the plaintiff's loss, the wrongful act of the workmen in taking the gasoline and their subsequent negligence in its use having intervened.

**BARKER, J.** The plaintiff procured Italian laborers for the service of the defendant, a corporation engaged in the construction of a public work at Weston. He had erected a temporary building on land of another person near the locality of the work. In a part of this building he kept goods which by an agent he sold to the laborers. The rest of the building was fitted with bunks for sleeping places and was occupied by the laborers for the use of which they paid him. When cold weather came they demanded a fire to heat their quarters, and threatened to quit work unless a stove and fuel were furnished.

One Keefe was the defendant's foreman. He requested the plaintiff's agent to provide a stove to keep the laborers comfortable, and the agent promised that he would write to the plaintiff and when he heard from him would get a stove. Some days later Keefe told the agent that unless the stove was put in he Keefe himself would order it, give it to the men and let them set it up. To this the agent objected and told Keefe that he had no right to put in a stove without the permission of the plaintiff. Finally Keefe procured a stove and had it set up by a carpenter and thereafter furnished the laborers with coal and wood and they constantly kept up a fire, themselves making the fires and helping themselves to the defendant's wood and coal. There was no zinc under the stove and the floor of the building was of wood with wide cracks between the boards.

About one hundred feet away the defendant had a storehouse in which barrels of oil and gasoline were kept but not under lock and key, and to which the laborers had access for the purpose of filling torches which they used to give light by which to work in a tunnel. The laborers who built the fires frequently helped themselves to the gasoline and used it in kindling fires in the stove. Keefe became aware of this and called the attention of the agent to it and told him he must stop it, but did nothing to secure the gasoline, although he notified the employee in



charge of the gasoline to prevent the laborers from getting it to use in the stove. The plaintiff's agent knew that the men were lighting the fires with the gasoline but it did not appear that he tried to prevent its use.

Some three weeks after the stove had been set up, as a laborer was kindling the fire, there was an explosion of gasoline; a few drops fell on the floor and a fire ensued which consumed the building and the plaintiff's goods therein.

The case was sent to an auditor who found that the loss caused to the plaintiff by the fire was \$1,622.64, but after stating in his report that and other facts, found for the defendant. Thereafter the case was tried by a judge of the Superior Court without a jury. The auditor's report was read. The defendant admitted that the plaintiff himself was in New York, continuously from November 5 to November 18, the fire having occurred on November 22. The plaintiff testified to his whereabouts from November 18 to November 23, and his evidence tended to show that he was not at Westón after the stove was set up and before the fire. The auditor having stated in his report that after the stove was set up Keefe had an interview with the plaintiff at which he informed the plaintiff that repeated efforts had been made to get a stove for the men and had stated to him what action he had taken in the matter the plaintiff said "it was all right" and having also reported that the plaintiff must have known that the stove had been set up and must have seen it, the plaintiff further testified that he never had any conversation with Keefe about the stove. This with the auditor's report was all the material evidence at the trial. The presiding judge found for the defendant and reported the case for the determination of this court.

It is plain that from the auditor's report as evidence, notwithstanding the defendant's admission at the trial that the plaintiff was in New York from the fifth to the eighteenth of November and the plaintiff's testimony that he never had any conversation with Keefe about the stove, the judge may have found that the plaintiff knew that the stove had been put in and had assented that Keefe's actions in the matter were satisfactory to him. This of itself would seem to be enough to require us to order judgment to be entered for the defendant on the finding in its favor.



But assuming that Keefe's act in putting in the stove was an uncondoned trespass a majority of the court are of opinion that the plaintiff cannot recover. The putting in of the stove for the use of the laborers did not of itself cause the destruction by fire of the plaintiff's building and goods. The possibility that the laborers in using the stove might negligently set the building on fire was too remote a contingency to render the defendant liable for it as a natural consequence of the trespass. See *Hawks v. Locke*, 139 Mass. 205, 208, and cases cited.

Nor would the facts that the defendant kept gasoline in barrels in a storehouse one hundred feet away and not under lock and key, and that the laborers without right helped themselves to the gasoline and by negligently using it burned the building and goods, make the defendant responsible. A wrongful act of the laborers against which Keefe had provided by his warning to the plaintiff's agent, as well as by his orders to the defendant's employee in charge of the storehouse, and the subsequent negligence of the laborers themselves in using the misappropriated gasoline both intervened between the keeping of the gasoline in an unlocked storehouse and the loss to the plaintiff. It was not under all the circumstances imperative upon the judge to find that it was negligence on the part of the defendant to keep gasoline in an unlocked storehouse. Nor, if he found that so to keep it was wanting in due care, was it imperative upon him to find that according to the usual experience of mankind the taking of the gasoline and its negligent use by the laborers ought to have been anticipated as probable. *Stone v. Boston & Albany Railroad*, 171 Mass. 536. *Glassey v. Worcester Consolidated Street Railway*, 185 Mass. 315.

It is not contended that the laborers when kindling the fire were acting within the scope of their employment as servants of the defendant.

*Judgment for the defendant on the finding.*

*H. J. Jaquith*, for the plaintiff.

*C. G. Bancroft*, for the defendant.



**JAMES A. KERR vs. BOSTON ELEVATED RAILWAY  
COMPANY.**

Suffolk. March 21, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Negligence, On highway.*

In an action against a street railway company for personal injuries, there was evidence, that the plaintiff was riding on a bicycle so near the track of the railway that a car going in the same direction could not pass him without striking him unless he turned to the right, that his reason for riding there was that the portion of the street at his right had been muddy and "hadn't got smoothed down," that his handle bars were low and the plaintiff "was bent over pretty well and going straight ahead, and not turning in either direction," that a car struck him from behind and threw him off his wheel into the street, that as the car approached no gong was sounded, that the "car did not stop but went right on," that the plaintiff had reason to believe that he could be seen by a motorman at a distance of at least two hundred feet, and that when the plaintiff heard the noise of the approaching car it was going so fast that there was not time for him to get out of the way. *Held*, that the questions of the due care of the plaintiff and the negligence of the defendant were for the jury.

TORT for personal injuries from being run into from behind by an electric car of the defendant as the plaintiff was riding a bicycle on Broadway near Lynde Street in Everett on the evening of October 19, 1901. Writ dated November 15, 1901.

In the Superior Court *Holmes*, J. ordered a verdict for the defendant on the ground that there was not sufficient evidence of due care on the part of the plaintiff. The plaintiff alleged exceptions.

*W. R. Bigelow*, for the plaintiff.

*J. F. Sweeney*, (*A. A. Capotosto* with him,) for the defendant.

HAMMOND, J. The plaintiff, an experienced bicyclist, while riding in a public macadamized street in which were double tracks of the defendant, came into collision with one of the defendant's cars going in the same direction. The accident occurred about 8 P. M. on October 19, 1901. The plaintiff for some minutes before had been riding so near to the outer rail of the track as to be in the way of any car passing upon that track, and he so continued up to the time of the accident. The dis-



tance from this outer rail to the curbstone was about fifteen feet, and on cross-examination the plaintiff testified that there was "no particular necessity for hugging the railroad tracks so closely with his machine," but in explaining his reason for being there said that the rest of the street had been muddy and "hadn't got smoothed down." There was the usual conflict of testimony as to the cause of the collision.

The defendant's theory was that at the time of the accident the plaintiff was somewhat under the influence of intoxicating liquor; that he was racing with the car; that the fork of the bicycle, which had been broken before and repaired, gave way, with the result that the plaintiff was thrown against the side of the car; and there was testimony justifying the conclusion that this was the correct theory.

The plaintiff's theory was entirely different. He testified that while he was going along the street "the first thing that attracted his attention he heard a noise, and the next thing he knew he was struck. He did not hear any bell. It was such a noise as is made by the wheels of a car. He was riding a wheel with low handle bars and was bent over pretty well and going straight ahead . . . and not turning in either direction. After he heard the noise he was struck on the left hip and side and thrown unconscious in the road." Upon cross-examination, "He could not say positively whether or not any cars had passed him from the time when he crossed the bridge until he was struck; he imagined there was. . . . He was not racing with the car. . . . He did not have time to get out of the way. His wheel was within a foot or a little over from the outer rail. . . . He had a clear road ahead of him." "He did not at any time ride alongside of the car which struck him." One witness called by the plaintiff testified that she saw the car "come up behind the plaintiff and strike him and throw him off his wheel into the street," that "the bell of the car was not rung," and that the "car did not stop but went right on towards Everett."

Of course if the theory of the defendant is correct the plaintiff has no case. But if the evidence presented by the plaintiff is to be believed we do not see why it would not justify a verdict in his favor. Both he and the car were travellers upon the street, with equal rights as such, except as modified by the fact



that the car could not leave the rail, and consequently that the plaintiff must not unreasonably interfere with its progress. *Commonwealth v. Temple*, 14 Gray, 69. The plaintiff had the right to travel upon any part of the highway, and could choose the path he took if he pleased. But the care required of him varied with the danger. If that path subjected him to a liability to be hit by a passing car he was bound to use reasonable care to avert such a collision. But he had the right to expect corresponding care on the part of the motorman. Upon his evidence a jury might have found that he had reason to believe that he could be seen by the motorman at a distance of at least two hundred feet; that it was reasonable that he should expect the gong to strike to let him know that a car in the rear desired to pass him, and that in other ways he might hear the car coming up in time to get out of the way. The evidence warranted a finding that the gong was not sounded; that the only warning given to the plaintiff was the noise of the car; and that the car was going so fast that when that warning reached him there was not time for him to get out of the way. It cannot be said as matter of law that the plaintiff in such a place should ride with his face constantly over his shoulder. In view of all the circumstances we are of opinion that the questions of the due care of the plaintiff and of the negligence of the defendant were for the jury. The principles involved in this case are somewhat discussed in *Le Blanc v. Lowell, Lawrence, & Haverhill Street Railway*, 170 Mass. 564; *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104; *Tashjian v. Worcester Consolidated Street Railway*, 177 Mass. 75; *Sullivan v. Boston Elevated Railway*, 185 Mass. 602.

*Exceptions sustained.*



## CHARLES A. WAGNER vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 21, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, &amp; BRALEY, JJ.

*Negligence. Elevated Railway Company. Contract.*

In an action by a workman employed by a sub-contractor to rivet steel upon a certain portion of the elevated structure of the Boston Elevated Railway Company then in process of construction under St. 1894, c. 548, against that company, for injuries caused by being thrown from a temporary platform, by loose planks of the platform on which the plaintiff was standing being knocked off by the trolley pole of an electric surface car of the defendant flying up and striking them as the car was passing around a curve, there was evidence that the trolley wire sagged, but that in running slowly around the curve, as all the motormen were ordered to do and as all of them previously had done, the trolley pole would not become disengaged, and that the car which caused the accident was running contrary to orders at an unusual rate of speed. *Held*, that the questions of the due care of the plaintiff and the negligence of the defendant were for the jury, and that it also was a question for the jury whether the plaintiff, knowing that the cars slackened their speed in passing over the curve, voluntarily assumed the risk of an accident from their running faster.

In an action against an elevated railway company by a workman employed by a sub-contractor in building a portion of the defendant's elevated structure in process of construction under a contract between a principal contractor and the defendant, for injuries alleged to have been caused by the negligence of the defendant, the rights of the plaintiff are not affected by the provisions of a contract between the principal contractor and the defendant in regard to accidents to workmen.

TORT, for personal injuries, against the Boston Elevated Railway Company, by a workman employed to rivet steel by Terry and Tench, sub-contractors, having a contract with the A. and P. Roberts Company, the principal contractor, to build a portion of the elevated structure of the defendant, the whole of certain lines of which the A. and P. Roberts Company had contracted with the defendant to construct. Writ dated December 14, 1899.

At the trial in the Superior Court before *Bishop, J.*, it appeared that the accident occurred on November 24, 1899, in front of the cathedral on Washington Street in Boston.

There was a provision in the contract between the defendant and the principal contractor that the defendant might affix its



trolley wires for the running of surface cars to the elevated structure. The trolley wire for the surface cars was suspended about eighteen inches below the cross braces from a wooden plank running longitudinally and hanging from the cross braces. This suspension of the trolley wire was for the use and convenience of the defendant in running its surface cars and was not a part of the work undertaken by the A. and P. Roberts Company or by Terry and Tench in building the elevated structure. The defendant attached its wires to the elevated structure as the work went on, following the work.

The plaintiff was engaged in riveting the iron pieces which had been put in position. There were short planks put cross-wise and fitted into the flange of the girders and upon these short planks other planks about sixteen feet long were placed length-wise of the track. Upon the last named planks the plaintiff was standing. At this point the surface track was upon a curve and the elevated structure was in process of construction upon the same curve.

The plaintiff testified that, as he was standing upon the planks engaged in his work, a surface car of the defendant came around the curve at a high rate of speed and that the trolley wire was loose and sagged at this place, that the trolley pole flew off the wire and up under the planks with great force, knocked the planks off the flanges of the girders, and threw the planks and himself into the air, and that he fell with the planks upon the ground and received the injuries complained of. Other material facts are stated in the opinion.

The defendant requested thirteen rulings. Of these the judge refused to make the following:

"1. On all the evidence the plaintiff is not entitled to recover, and the verdict should be for the defendant.

"2. On the evidence the plaintiff assumed the risk of the accident which occurred, and cannot recover.

"3. The defendant having entered into a contract with the Roberts Company to build the elevated structure, and by the terms of the contract the defendant having the right to attach its wires to the structure when erected for the purpose of running its cars, and the Roberts Company having agreed to assume the risk of injuries to its men or materials by reason of accidents



arising therefrom, the plaintiff, having engaged in the work either under the Roberts Company or its sub-contractors Terry and Tench, must be held to have assumed the risk to the same extent as the Roberts Company so far as this defendant is concerned, and he cannot recover.

"4. There is no evidence to justify the jury in finding that the defendant owed the plaintiff any duty, or that it was guilty of any negligence towards him on the occasion in question."

"9. Even though the jury may find that the car was run at an unsafe rate of speed, still, if the plaintiff knew, or by the exercise of reasonable care might have known, that such a thing was liable to occur, then he assumed the risk of it and cannot recover.

"10. The defendant would not be liable to the plaintiff for the negligence of the motorman or conductor in running or operating the car on the occasion in question.

"11. The plaintiff must be held to assume the risk of ordinary negligence on the part of the servants of the defendant in carrying on its business or incident thereto."

The jury returned a verdict for the plaintiff in the sum of \$2,000; and the defendant alleged exceptions.

*P. H. Cooney, (L. F. Hyde with him,)* for the defendant.

*S. A. Fuller,* for the plaintiff.

BRALEY, J. At the time the plaintiff received his injuries he was helping to build an elevated railway for the defendant within the location granted to it by St. 1894, c. 548. The part upon which he was engaged was being built by his employers under a contract with the A. and P. Roberts Company, who had a general contract with the defendant to build the entire structure. It follows, and is to be assumed, that he was lawfully upon the premises by the defendant's invitation, who thus owed to him the duty of using due care to prevent his being injured from exposure to unusual dangers not known to him that might be caused by the negligent running of its surface cars beneath the platform where he was at work. *Wendell v. Baxter*, 12 Gray, 494. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 268. *Corrigan v. Union Sugar Refinery*, 98 Mass. 577. *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216. *Severy v. Nickerson*, 120 Mass. 306, 307. *Shea v. Gurney*, 163 Mass. 184. *Cowen v. Kirby*, 180 Mass. 504.



There was evidence on the part of the plaintiff which tended to show that the platform upon which he stood was suspended over a curve in the surface track, and although the trolley wire sagged, the trolley pole would not become disengaged if the car ran slowly.

It further appeared that the car the trolley pole of which caused the accident was running at an unusual speed of from five to seven miles an hour notwithstanding orders had been given by the defendant to its motormen to reduce speed when passing under the overhead structure where the men were at work. An electrical expert, who testified in behalf of the plaintiff, stated that if the conducting wire was slack, and the car moved rapidly, the trolley would be thrown, for the higher the speed the more danger there was of such an occurrence.

If this testimony was believed, the jury could find that through the negligence of the defendant's servants the trolley pole left the conducting wire, flew up, struck the platform, and by the violence of its impact caused it to fall.

The defendant, however, urgently claims that the plaintiff was not in the exercise of due care, and that by his conduct he assumed the risk of all accidents that might arise under his employment, even if caused by its negligence.

To support this contention it principally relies on the case of *Woodley v. Metropolitan District Railway*, 2 Ex. Div. 384. It was there said by the majority of a divided court that the plaintiff had assumed the risk of negligence on the part of the defendant's servants, though at the time of his injury he was in the employment of a contractor, and rightfully upon the defendant's premises under his master's contract.

But it was held in the later cases of *Yarmouth v. France*, 19 Q. B. D. 647, *Thrussell v. Handyside*, 20 Q. B. D. 359, 365, and *Smith v. Baker*, [1891] A. C. 325, that knowledge by the servant did not conclusively limit the liability of the master, and it was a question of fact whether he voluntarily took the chance of injury.

This last case was referred to with approval in *Mahoney v. Dore*, 155 Mass. 513, 519, where it was said by Mr. Justice Knowlton, "We are not aware of any adjudications in this Commonwealth which are necessarily inconsistent with this just



and reasonable doctrine, although different opinions have been expressed on this point by eminent judges both here and in England."

If a servant assumes known and obvious risks, mere knowledge that they exist is not sufficient, as there must be a voluntary exposure of himself, with a full appreciation of the danger that may be incurred. *Leary v. Boston & Albany Railroad*, 139 Mass. 580. *Scanlon v. Boston & Albany Railroad*, 147 Mass. 484. *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155. It is true that these suits were by a servant for his master's negligence which was not impliedly assumed by his contract of employment. But as the doctrine is held to be applicable where, as in the present case, this relation does not exist, to bar a recovery similar conditions of knowledge and consent must be found. *Wood v. Locke*, 147 Mass. 604.

Because they were not subject to the control of a common master, the plaintiff was not in any sense a fellow servant of the defendant's employees. *Morgan v. Smith*, 159 Mass. 570. *Reagan v. Casey*, 160 Mass. 874. *Delory v. Blodgett*, 185 Mass. 126. *Smith v. Steele*, L. R. 10 Q. B. 125.

The plaintiff's evidence was to the effect that up to the time of his injury he had observed that the speed of the cars slackened when they passed over the curve, and the pole followed the trolley wire. Whether in the exercise of due care he ought reasonably to have anticipated that they might run faster, with the corresponding probability of injury to himself, or whether by his conduct he willingly exposed himself to what finally occurred, were issues of fact for the jury. *Powers v. Boston*, 154 Mass. 60, 68. *Hannah v. Connecticut River Railroad*, 154 Mass. 529, 538. *Ryan v. New York, New Haven, & Hartford Railroad*, 169 Mass. 267, 271. *Meagher v. Crawford Laundry Machinery Co.* 187 Mass. 586.

The plaintiff then cannot be held as a matter of law to have been negligent in placing himself in a position concerning the full danger of which he says he had no knowledge simply because he chose to continue his work in a place provided for him by his employer. *Mahoney v. Dore*, *ubi supra*. *Bell v. New York, New Haven, & Hartford Railroad*, 168 Mass. 448. *Murphy v. Marston Coal Co.* 188 Mass. 885, 888.



But the defendant further contends that the plaintiff agreed to incur the particular danger by which his injuries were caused, and therefore he cannot recover.

By the usual contract of employment it is settled, whether at common law or under R. L. c. 106, § 71, that the servant impliedly agrees to take things as he finds them, and for the wages paid to expose himself to the ordinary dangers incidental to the service, but this does not include concealed risks or subsequent negligence of the master. *O'Maley v. South Boston Gas Light Co.* 158 Mass. 185, 186. *Garant v. Cashman*, 188 Mass. 18.

Here the plaintiff sustained no contractual relation to the defendant whatever, unless it be found in the general contract for the entire work. To this agreement he was not a party, neither is there any evidence that it was brought to his knowledge. Moreover, he was in the employment of contractors who not only were strangers to it, but also are not shown to have known of its terms. *Abbey v. Chase*, 6 Cush. 54. *Burt v. Boston*, 122 Mass. 223, 227. *Leydecker v. Brintnall*, 158 Mass. 292, 297. *Railton v. Taylor*, 20 R. I. 279.

If this contract could be treated as creating an exemption of the defendant from liability for injuries caused to the plaintiff by its negligence while in its employment such an agreement would be in violation of R. L. c. 106, § 16, and unenforceable. But as the relation of master and servant did not exist a general release by him would have been valid.

In the building of the elevated railway the contract provided that the work of construction should proceed in connection with the usual operation of the surface road, which was located directly under the overhead structure. That during the progress of the undertaking accidents thereby might be caused to the employees of each of the contracting parties, or to others whether passengers upon the defendant's cars or travellers upon the public ways, was apparent.

Upon an examination of its provisions so far as they relate to the question raised, the contractor agrees to indemnify the defendant for all damages it may sustain by reason of suits, by whomsoever brought, for injuries arising from the negligence of workmen, who may be employed under the contract, but for which the defendant primarily would be responsible. *Carleton v.*



*Franconia Iron & Steel Co., ubi supra. Sturges v. Theological Education Society*, 130 Mass. 414. *Woodman v. Metropolitan Railroad*, 149 Mass. 335.

The only language found which gives even a semblance to the defendant's argument is contained in § 55: "The company will not be responsible for any accidents caused by the trolley, feed, or other wires, to men or materials upon or about the work in connection with the performance by the contractor of his work hereunder, and the contractor agrees to hold the company harmless and indemnified from any claims in respect to such accidents." In our opinion this clause does not support such a view.

The instructions under which the case was submitted to the jury were full and accurate, and so far as proper the rulings requested by the defendant were adopted.

*Exceptions overruled.*

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TIMOTHY HURLEY vs. COMMONWEALTH.

PATRICK J. GOUGH vs. SAME.

Suffolk. March 29, 30, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & BRALEY, JJ.

*Contempt. Error, Writ of. Practice, Criminal, Contempt, Sentence. Words, "Criminal case."*

A formal presentation to the court signed by a sworn prosecuting officer is a sufficient verification of facts constituting a constructive criminal contempt to justify judicial action.

Under R. L. c. 198, § 9, and R. L. c. 156, § 3, a writ of error from this court lies to reverse a judgment of the Superior Court punishing a criminal contempt of court consisting of an offer to influence and corrupt jurors sitting in the trial of a case.

Under R. L. c. 166, § 13, providing that commitments for contempt of court may be made to any jail in the Commonwealth, a criminal contempt of court cannot be punished by imprisonment in the house of correction. R. L. c. 220, § 5, does not apply to a case of contempt.

KNOWLTON, C. J. These are writs of error brought by two persons, each of whom in the Superior Court was found guilty of contempt of court and sentenced to be punished by imprison-



ment in the house of correction, Hurley "for the term of eighteen months at hard labor" and Gough "for the term of one year at hard labor." The first question before us is whether a writ of error lies in such a case. The general rule at common law does not permit a proceeding for contempt to be revised by a higher court upon an appeal or writ of error. In *Yates's case*, 4 Johns. 317, 369, Chief Justice Kent, stating the rule and referring to the *Earl of Shaftsbury's case*, 1 Mod. 144, said in conclusion, "The court in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle, that every court, at least of the superior kind, in which great confidence is placed, must be the sole judge, in the last resort, of contempts arising therein, is more explicitly defined, and more emphatically enforced, in the two subsequent cases of *The Queen v. Paty and others*, and of *The King v. Crosby*." In *Vilas v. Burton*, 27 Vt. 56, 60, 61, we find language of Chief Justice Redfield as follows: "Proceedings for contempt in one court . . . are not revisable in any other court. . . . If it be said that a power to punish at discretion is a dangerous power to trust to a single magistrate, however high, we can only say, it is one which the law of England has always seen fit to repose there, . . . and one which, in these times, ordinarily, is very little liable to abuse." Similar statements of the law are found in many other opinions. See *In re Debs*, 158 U. S. 564, 595; *In re Nevitt*, 117 Fed. Rep. 448; *Tyler v. Hamersley*, 44 Conn. 419; *State v. Towle*, 42 N. H. 540; *In re Cooper*, 82 Vt. 258; *Watson v. Williams*, 36 Miss. 331; *Johnston v. Commonwealth*, 1 Bibb, 598; *Williamson's case*, 26 Penn. St. 9, 20; *Ex parte Martin*, 5 Yerg. 456; Rapalje, Contempts, § 141. But in many of the States statutes have been passed which have been construed to authorize appeals or writs of error in proceedings for contempt, and the tendency of judicial decision, in recent years, has been to open for revision rulings on questions of law in this class of cases as well as in others. In this Commonwealth the question whether a writ of error will lie never has been decided, although a case of this kind was entertained without question of the jurisdiction by counsel, or formal consideration of it by the court. *Telegram Newspaper Co. v. Commonwealth*, 172 Mass.



294. This case hardly can be considered a binding authority, inasmuch as the plaintiff in error was held to have no standing on the merits, and the result did not depend upon the right of the court to take jurisdiction. But the fact that jurisdiction was assumed without question is significant of the general view of the justices, even though the question was not raised.

If we have jurisdiction of these cases, it is under the R. L. c. 198, § 9, which is as follows: "A judgment in a criminal case may be re-examined and reversed or affirmed upon a writ of error for any error in law or in fact." The provision of R. L. c. 156, § 8, is broad and sweeping, in these words: "The Supreme Judicial Court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided"; etc.

It is contended that the words, "judgment in a criminal case" were not intended to include a sentence to punishment for a contempt of court, and it certainly is doubtful whether the Legislature had in mind a case of this kind. A proceeding for contempt is not a criminal case in the sense that all the provisions of our statutes in regard to criminal practice and procedure are applicable to it. But contempts of court are often classified as criminal and civil, and while the line of division between these two classes is not easily definable, since civil contempts often include elements of wrong which are peculiarly characteristic of criminal contempts, it is universally recognized that an offence, committed directly against the authority and dignity of the court, as distinguished from mere disobedience of an order made for the benefit of a party, is therefore called a criminal contempt. The punishment of such an offence is solely for the vindication of public authority and the majesty of the law. In general, the proceedings leading up to the punishment should be in accordance with the principles which govern the practice in criminal cases. In a broad sense, the prosecution of such an offender is a criminal case, and the sentence to punishment is a judgment. Considering together the statutes quoted above, we are of opinion that we do no violence to the general purpose of the Legislature, in holding that a sentence to punishment for a distinctively criminal contempt is a judgment in a criminal case, which may be re-examined upon a writ of error.



The first error alleged in the proceedings is that the matter was not properly brought before the court, since no affidavit was filed as a foundation for further proceedings. A prosecution for contempt of court is *sui generis*. It calls for the exercise by the court of its summary power to punish for conduct tending to obstruct or degrade the administration of justice. This power is inherent in the superior courts, because it is essential to the execution of their orders and the maintenance of their authority, and it has been recognized and used from the earliest times. If a contempt is committed in the presence of the judge, no complaint or process is necessary to give the court jurisdiction of the offender, but the court may act upon its judicial knowledge, and the contemnor may be taken into custody at once. If the contempt, instead of being direct, is indirect and constructive, knowledge of it should first be brought to the court in a way to justify formal action. This is usually by an affidavit setting forth the facts of which complaint is made. While most of the technical requirements of criminal statutes have no application, the hearing should be had with due regard for the rights of the accused, and in view of the fact that, if found guilty, he may be subjected to criminal punishment. The proper procedure is, therefore, closely analogous to that in ordinary criminal cases.

In the present case the proceedings were begun by a formal complaint to the court, made by the first assistant district attorney of Suffolk County in his official capacity. He is one of the prosecuting officers of the court, duly sworn to the proper performance of his official duties. While the making of a complaint of this kind is not required of him by any statute, it is in the general line of the duties which he is regularly performing. A complaint of this kind, signed by him as a public officer, may fairly be said to carry with it the sanction of his oath of office. In the absence of a statute or of an established rule of law requiring that in all cases the complaint itself shall be sworn to, we think the matter was brought to the attention of the court with such support and assurance of its verity as justified the issuance of process and the subsequent hearing. In *Welch v. Barber*, 52 Conn. 147, 157, the court said, in reference to the inauguration of proceedings for a contempt of this kind: "The proper course



is for some informing officer to bring it to the attention of the court." So in *Ex parte Wright*, 65 Ind. 504, 508, and *State v. Ackerson*, 1 Dutch. 209, 211, it was said that the court might act upon the official return of a public officer. Assuming, as we do, that a statement of a constructive criminal contempt should be properly verified before action is taken upon it by a court, we are of opinion that a formal presentation, by a sworn prosecuting officer, is a sufficient verification to justify judicial action. See *Cartwright's case*, 114 Mass. 230; *State v. Frew*, 24 W. Va. 416, 469; *Ex parte Moore*, 63 N. C. 397; *State v. Morrill*, 16 Ark. 384.

The next contention of the plaintiffs in error is, that the facts found by the presiding judge do not constitute contempt of court, and that the complaint does not charge a crime. Each of the plaintiffs was adjudged guilty of contempt of court, in that he "did wilfully and corruptly approach Edward F. McClennen, an attorney at law, then engaged in the trial of said causes of Atkins and Snow against the City of Boston, and did wickedly and corruptly offer to influence and corrupt some of the jurors, then sitting in the trial of said causes, and did solicit and endeavor to procure said McClennen to give and offer to said jurors through them, the said Hurley and Gough, gifts and gratuities of money, with intent thereby to corrupt said jurors as aforesaid and to influence the decision of said cases." This was a very gross and wicked attempt to interfere with the administration of justice in court, and was a contempt which deserved severe punishment. It was an attempt at bribery of persons in an important position of trust. Contempts of this kind are most dangerous assaults upon the integrity of our courts in the trial of cases. It is inconceivable that any court would treat such an offence as anything less than a criminal contempt of the gravest character. See *Cuddy, petitioner*, 131 U. S. 280; *Little v. State*, 90 Ind. 388; *Bradley v. State*, 111 Ga. 168, 174; *Langdon v. Wayne Circuit Judges*, 76 Mich. 358.

The last contention of the plaintiffs in error is that the sentences were illegal, inasmuch as they directed imprisonment in the house of correction instead of in the jail. The warrants of commitment, in terms, directed that this should be at hard labor, in that respect going beyond the language, although perhaps not



beyond the legal effect of the judgment. The statutory provision for such cases is found in the R. L. c. 166, § 13, in these words: "Commitments for contempt of court may be made to any jail in the Commonwealth." This is the only statute which deals directly with the subject, and we are of opinion that it is exclusive of any other general provision. The authority given in R. L. c. 220, § 5, to sentence to imprisonment in the house of correction when one is convicted of a crime punishable wholly or in part by imprisonment in the jail, does not apply to a case of contempt of court, which is not a crime punishable in any particular way. Apart from the contention of the counsel of the plaintiffs that a punishment of a year and a half in the house of correction, to which one of the plaintiffs in error was sentenced, is an infamous punishment, which cannot be imposed under the Constitution without trial by jury, in regard to which we express no opinion, we think that this part of the sentence was erroneous. The general practice, both in England and in the United States, has been to sentence to the jail, when imprisonment is ordered in this class of cases. Indeed, in the absence of any statute, it has been held that imprisonment at hard labor is illegal. *Rogers Manuf. Co. v. Rogers*, 38 Conn. 121. *In re Fil Ki*, 80 Cal. 201.

Under the R. L. c. 193, § 12, "If a final judgment is reversed by reason of error in the sentence, such judgment shall be rendered in the case as the court below should have rendered, or it may be remanded for that purpose to said court." The judgment should be reversed, and the case remanded to the Superior Court for a change of the sentence, as to the place of confinement, from the house of correction to the jail.

*So ordered.*

*O. Storer*, (*J. F. Adams* with him,) for the plaintiffs in error.  
*F. H. Nash*, Assistant Attorney General, for the Commonwealth.



**GLOBE NEWSPAPER COMPANY vs. COMMONWEALTH.**

Middlesex. March 30, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & BRALEY, JJ.

*Error, Writ of. Contempt.*

A writ of error from this court lies to reverse a judgment of the Superior Court ordering the proprietor of a newspaper to pay a fine for contempt of court in publishing after an indictment for murder and before the trial a statement and discussion of a portion of the government evidence supposed to have been prepared for the trial.

It is not a ground for reversing a judgment of the Superior Court, ordering the proprietor of a newspaper to pay a fine for contempt of court in publishing a statement of a portion of the government evidence supposed to have been prepared for a murder trial with facsimiles of handwriting and signatures and a discussion of the opinions of experts, that at the time of the publication the trial was not in progress nor immediately to take place, if the indictment had been found several months before and a time had been appointed for the trial and afterwards the trial had been postponed and its date had not been fixed. Nor is it any ground for the reversal of such a judgment that the statements in the publication were true, or that the publisher did not intend to injure either of the parties to the case or to interfere with the administration of justice.

KNOWLTON, C. J. This is a writ of error to the Superior Court, to correct alleged errors in the proceedings whereby the plaintiff in error was found guilty of a contempt of court in publishing in its newspaper two articles relative to a prosecution for murder, upon an indictment then pending against one Charles L. Tucker.

The first question is whether a writ of error lies in such a case. This question was considered and decided affirmatively in the case of *Hurley v. Commonwealth*, ante, 443.

The first assignment of errors is that the publication did not constitute contempt, in that "said articles were published, not during the progress of the Tucker trial nor immediately before said trial, but at a time when the assignment of the date for said trial had been revoked and said trial had been indefinitely postponed." The defendant's plea in this part of the case is, *In nullo est erratum*. This raises the question of law, whether the publication of an article which otherwise would constitute contempt of court, as tending to obstruct the administration of jus-



tice, can be justified on the ground that the trial to which it relates is not then in progress, nor immediately to be begun, but is to occur at a time to be afterwards fixed. When the articles and the circumstances of publication are such as appear in the present case, we are of opinion that it cannot be so justified. The disturbing and obstructing effect of such an article might be greater if the publication was immediately before the trial than if it occurred months before, and this should be taken into account in imposing the sentence. In some cases, the difference in the degree of detriment that would be expected to result might be sufficient to constitute a contempt if the publication were just before the trial, when the same publication, a long time before the trial, would affect the case so little as not to deserve punishment. But it is enough to subject the offending publisher to punishment if the publication is very objectionable, and the case to which it relates is pending at the time of publication. *Onslow's case*, L. R. 9 Q. B. 219. *Hunt v. Clarke*, 58 L. J. Q. B. 490. See also *In re Cheltenham & Swansea Railway Carriage & Wagon Co.* L. R. 8 Eq. 580; *In re Sturoc*, 48 N. H. 428; *Respublica v. Oswald*, 1 Dall. 319. In *Rex v. Parke*, [1903] 2 K. B. 432, the publication in a newspaper was made before one accused of murder was even indicted. It was contended that as no cause was pending in the high court, and it was not certain that there would be an indictment, the high court had no jurisdiction to fine the publisher for contempt. Proceedings having been instituted before a magistrate, it was held, after the fullest consideration, that the court had jurisdiction, and punishment was inflicted. Wills, J. said in the opinion: "Great stress has been laid upon an expression which has been used in the judgments upon questions of this kind—that the remedy exists when there is a cause pending in the court. We think undue importance has been attached to it. . . . It is possible very effectually to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased." In the present case the indictment was found several months before the publication, and the time for trial had been appointed and postponed. The plaintiff in error had full knowledge that the publication might affect the proceedings in the pending case. The facts stated in this assignment show no error.



The second assignment of errors was on the ground "that said articles were true and impartial statements of news and facts, were not intended to injure either the prosecution or the defence in said trial, and were not intended to reflect upon the dignity of the court or to hinder or interfere with the due administration of justice." The defendant in error moved to strike out this assignment, on the ground that the matters alleged in it were immaterial. At the hearing before a single justice the parties agreed that an order might be entered, granting this motion, with a stipulation that if, as matter of law, the motion should have been denied, the plaintiff in error should take such benefit from the assignment as the full court might deem it entitled to under the agreed statement of facts. It was accordingly so ordered.

As a preliminary to the discussion of the question thus raised, it may be well to refer to the publication. Two articles were published, the first in the Boston Sunday Globe of September 18, 1904, and the second in the Boston Daily Globe, on Monday, September 19, 1904. The first was a very long and elaborate article, which, after striking headlines, began with a facsimile of a specimen of Charles L. Tucker's handwriting taken from a letter, with his signature, followed immediately by a facsimile of a paper found by the side of the body of Mabel Page, who was murdered. Then came headlines, the first of which was: "Battle of the experts bids fair to be one of the most notable in the history of murder cases." The first part of the general discussion of the subject is entitled, "Analysis of the disputed 'Morton' address," and it goes at great length into the particulars of likeness and unlikeness in the handwriting, as they might appear to experts, referring to letters and parts of letters, as well as to the words, including interviews with four different experts in handwriting, who were said to have been employed by the Commonwealth, and a very elaborate discussion of the supposed relations of every part of the evidence to be found in these papers to the other evidence on which the Commonwealth was expected to rely. The supposed views and opinions of the experts in handwriting were given, with a very full statement purporting to be made by one of them in an interview, and with much briefer statements made by the others who declined to talk about par-



ticulars. The acts and methods of the attorney general and his assistants in the preparation of the case, in connection with this writing, were stated in detail. The account was embellished in its different parts with pictures of the four experts, and was of a sensational character. The article in the paper of Monday was headed, "New interest in the Tucker case. Globe's publication of facsimile of handwriting has aroused it." It referred to the slip of paper as the "leading and most assiduously guarded feature of the government case against Charles L. Tucker." It said, among other things, "Every one had an opportunity to see this 'Morton' address, examine it for himself and judge of its importance in the solution of the murder mystery. . . . Naturally, every reader set out to constitute himself a handwriting expert, and thousands of Globe readers were analyzing the 'Morton' penmanship yesterday and forming their own impressions as to its likeness to the hand of the prisoner. Of course there were countless opinions on both sides of this question. The account of how the leading handwriting experts proceeded to scrutinize this evidence and reach their conclusions was also instructive." In this article there was a further discussion, at considerable length, of additional supposed features of the evidence, all designed, so far as possible, to give the public a picture of the expected trial, as it would appear whenever it should occur.

It needs no argument to show that such publications were highly improper, and were a gross interference with the administration of justice in an important criminal case. The effect of the first publication, as described in the second, was such as no newspaper publisher had a right to attempt to produce in anticipation of a trial. In *Hunt v. Clarke*, 58 L. J. Q. B. 490, Lord Justice Cotton said in the opinion: "If any one discusses in a paper the rights of a case or the evidence to be given before the case comes on, that, in my opinion, would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the court should come to the conclusion that a judge or a jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is a contempt, and would be met with the necessary punishment in order to restrain such conduct."

The effect of this publication would naturally be to absolutely



disqualify many persons to sit as jurors, and thus make more difficult the work of the court in endeavoring to impanel an impartial jury. It would be likely, even without their consciousness of bias, to affect the minds of other persons, who might be permitted to sit upon the jury on the ground that they had not formed such an opinion as to render them unfit to perform this public duty. In other ways which it is not necessary to state, such publications might be detrimental to the public interests involved in the pending case. The writer had not the excuse that he was communicating facts of a public nature which it might be proper to publish. The article was a disclosure of the efforts of the Commonwealth's officers, in the examination and preparation of evidence, information of which, if one chanced to obtain it, should have been treated as confidential.

The question raised by the second assignment of errors is whether the truth of such a publication, and the lack of a positive intention on the part of the publisher to injure either of the parties to the case, or to interfere with the administration of justice, relieves him from liability for contempt. We have no doubt that such facts are material in relation to the punishment that should be inflicted. In certain classes of cases for criminal contempt in the courts of common law, where the question was whether one intended to reflect upon the dignity of the court, it has been held that the accused may purge himself by an answer under oath, disavowing any wrongful intent or disrespect to the court. *Wells v. Commonwealth*, 21 Gratt. 500. *Ex parte Biggs*, 64 N. C. 202. *In re Walker*, 82 N. C. 95. *Buck v. Buck*, 60 Ill. 105, 106. It is, however, the better rule, that such a disavowal is not conclusive, and that the whole matter is for the court, upon the facts and evidence. *State v. Matthews*, 37 N. H. 450. *Huntington v. McMahon*, 48 Conn. 174. *In re Chadwick*, 109 Mich. 588, 604. In reference to a case like the present, where something is done which obviously has a direct tendency to obstruct the administration of justice in a court, the rule stated in this Commonwealth seems to require, to subject one to punishment for contempt, no intent other than the intent to do the act itself which is objectionable. *Cartwright's case*, 114 Mass. 230. *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 300. Under these decisions the actor, in such cases,



should be presumed to intend the natural consequences of his wilful act, and he should not be permitted to show, in justification, that he was ignorant of the probable consequences of it.

We are of opinion that such a publication of evidence procured by the officers of the law is not justified by showing that the statements are true, and that the intentional publication was without an express intent to injure either of the parties to the case, or to reflect upon the dignity of the court, or to hinder or interfere with the administration of justice. It follows that the plaintiff can take nothing by its writ.

*Judgment affirmed.*

*C. T. Gallagher*, (*H. Whitmore* with him,) for the plaintiff in error.

*F. H. Nash*, Assistant Attorney General, for the Commonwealth.



CHARLES F. CHAMBERLAYNE vs. MALVINA S. NAZRO.

Suffolk. March 30, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & BRALEY, JJ.

*Practice, Civil, Abatement.*

Filing an answer to the merits waives the right to set up matter in abatement.

Failing to object to the reference of a case to an auditor and appearing at the hearing before the auditor on the merits waives any right to set up matter in abatement.

CONTRACT for a balance alleged to be due for services rendered by the plaintiff as an attorney at law and for disbursements in behalf of the defendant. Writ dated January 3, 1902.

In the Superior Court the case was tried before *Lawton, J.* At the close of the evidence the defendant requested the judge to rule: "1. An attorney cannot in the same action, act both for his client and himself, when their interests are in conflict. 2. In a conflict of interests, it is the duty of an attorney, while the relationship of attorney and client exists, to serve the interests of his client instead of his own. 3. If the plaintiff brought this action for the defendant's benefit and on her behalf, he can-



not maintain it for his own benefit. 4. If he brought it to protect her interests, when that object was accomplished, he was bound to discontinue it, and cannot now maintain it in his own interest, against hers. 5. If the plaintiff brought the action for the defendant's benefit and protection, he cannot maintain it for his own benefit, even though on learning of it she afterwards disapproved of it. 6. Having once notified him to discontinue it, she was not required to repeat her wish in reply to subsequent letters or propositions of his."

The judge informed the counsel that he should not pass on the defendant's requests for instructions, but should submit to the jury only the question whether any disbursements of money were made and services performed by the plaintiff and what was a reasonable compensation therefor, and should require answers by the jury to the three questions quoted below. To this refusal to instruct, the defendant excepted but did not suggest to the judge that any of her instructions requested were applicable to the case as submitted to the jury, and the judge assumed that they all referred to the defendant's special defence, the ground of which is stated in the opinion, and in no part to her general denial. The case was so submitted to the jury under instructions to which no exception was taken by the defendant. After the verdict the defendant renewed her requests for rulings, and they were refused.

The three questions above referred to and the answers of the jury to them were as follows: "1. Did the defendant assent expressly or by implication at any time to the bringing of this suit against her?" "No."—"2. Did the defendant, before or at about the time of the payment of the execution for costs, expressly or by implication ask to have the suit discontinued?" "Yes."—"3. Has the defendant by herself or by her attorney expressly or by implication waived at any time her right to ask to have the suit discontinued?" "No."

The jury returned a verdict for the plaintiff in the sum of \$53.78; and the defendant alleged exceptions.

*J. S. Patton & C. F. Williams*, for the defendant.

*W. N. Poland*, for the plaintiff.

KNOWLTON, C. J. At the trial of this case no question of law was raised in regard to the liability of the defendant on the



merits, but the only legal defence was in the nature of a claim in abatement, that the plaintiff could not maintain his action, because, at the time of bringing it, he was acting as the attorney of the defendant, for whose benefit the action was brought to meet a claim of another person against her. The contention was, in substance, that conceding the liability of the defendant on the merits, the action was brought improperly and without legal authority, because the plaintiff could not act for himself while acting for the defendant. This was properly a matter in abatement. *Boynton v. Willard*, 10 Pick. 166, 169.

The first answer was a general denial and a plea of payment. One year and eight months later an amended answer was filed by consent, which again made a general denial and a plea of payment, and added this averment in the nature of an answer in abatement. It appears that the case was heard before an auditor upon the merits, although his report is not before us. At the close of the evidence at the trial in the Superior Court, the defendant made the request for rulings which raised the questions on which she now relies. So far as appears by the record before us, this was the first time that this defence was brought to the attention of the court.

It was then too late to raise such a question. In the first place, the answer on the merits was a waiver of the right to set up a matter in abatement. The reference to the auditor without objection by the defendant and the hearing before him on the merits were an even more pronounced waiver of any question as to the bringing of the action. This hearing was followed by a trial in the Superior Court, in which, at the close of the evidence, these requests were first made. If the defendant desired to have the case disposed of on the ground that it was brought before the court improperly and without authority, she should have raised the question at the outset. *Boynton v. Willard*, 10 Pick. 166, 169. *Seagrave v. Erickson*, 11 Cush. 89. *Cole v. Ackerman*, 7 Gray, 38. *Hastings v. Bolton*, 1 Allen, 529. *Morton v. Sweetser*, 12 Allen, 184, 187.

If the question were open, we might come to the same result. The evidence would warrant a finding that the plaintiff, in bringing the action, was acting in part in his own interest as a creditor of the defendant, and in part for her interest in reference to the



other claim. There was no evidence that the defendant ever authorized his bringing the action on her account, and the jury found that she never ratified it, but utterly repudiated it. Upon these findings, if he acted in part for himself, that part of his action well might stand, and the case would be before the court legally.

*Exceptions overruled.*

EMILY G. PERRY vs. COMMONWEALTH.

ELISE H. READ vs. SAME.

Suffolk. May 18, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., MORTON, BARKER, LORING, & BRALEY, JJ.

*Way, Highway. Hancock Avenue.*

The foot walk or passageway eight feet in width at the west of the State House grounds in Boston called Hancock Avenue is not a public street or a private way within the meaning of St. 1892, c. 419, § 25, as amended by St. 1894, c. 443, § 9, restricting the height of buildings in Boston.

PETITIONS, filed June 1, 1900, by the owners of lots numbered respectively 6 and 5 on Hancock Avenue in Boston, for the assessment of damages caused to their property by the passage of St. 1899, c. 457, restricting to seventy feet the height of buildings in a certain territory west of the State House in Boston.

In the Superior Court the parties waived a trial before the auditors theretofore appointed and also waived a trial by jury, and the cases were submitted to *Hardy, J.* upon an agreed statement of facts.

He ruled *pro forma* in accordance with the contention of the petitioners, that at the time of the passage of St. 1899, c. 457, the premises of the petitioners were not subject to the restriction of St. 1892, c. 419, § 25, as amended by St. 1894, c. 443, § 9, that the petitioner Perry accordingly was entitled to recover the sum of \$7,000, and that the petitioner Read was entitled to recover the sum of \$6,800, in each case with interest at six per cent from June 2, 1899. At the request of the parties, he reported the cases for determination by this court. If the ruling was correct, judgment was to be entered for the petitioners in



the aforesaid sums. If the ruling was not correct, judgment was to be entered for each petitioner in the sum of \$2,500, with interest from June 2, 1899, or such other judgment was to be entered as the law required.

St. 1894, c. 448, § 9, is as follows:

“Section 9. Said chapter four hundred and nineteen is amended by striking out section twenty-five and inserting in place thereof the following new section:—Section 25. No building or other structure hereafter erected, except a church spire, shall be of a height exceeding two and one half times the width of the widest street on which the building or structure stands, whether such street is a public street or place, or a private way existing at the passage of this act or thereafter approved as provided by law, nor exceeding one hundred and twenty-five feet in any case; such width to be the width from the face of the building or structure to the line of the street on the other side, or if the street is of uneven width, such width to be the average width of the part of the street opposite the building or structure. If the effective width of the street is increased by an area or setback the space between the face of the main building and the lawfully established line of the street may be built upon to the height of twenty feet.”

A copy of a plan which was annexed to the report is printed on the opposite page.

*C. Warren, G. Perry & J. Codman*, for the petitioner Perry.

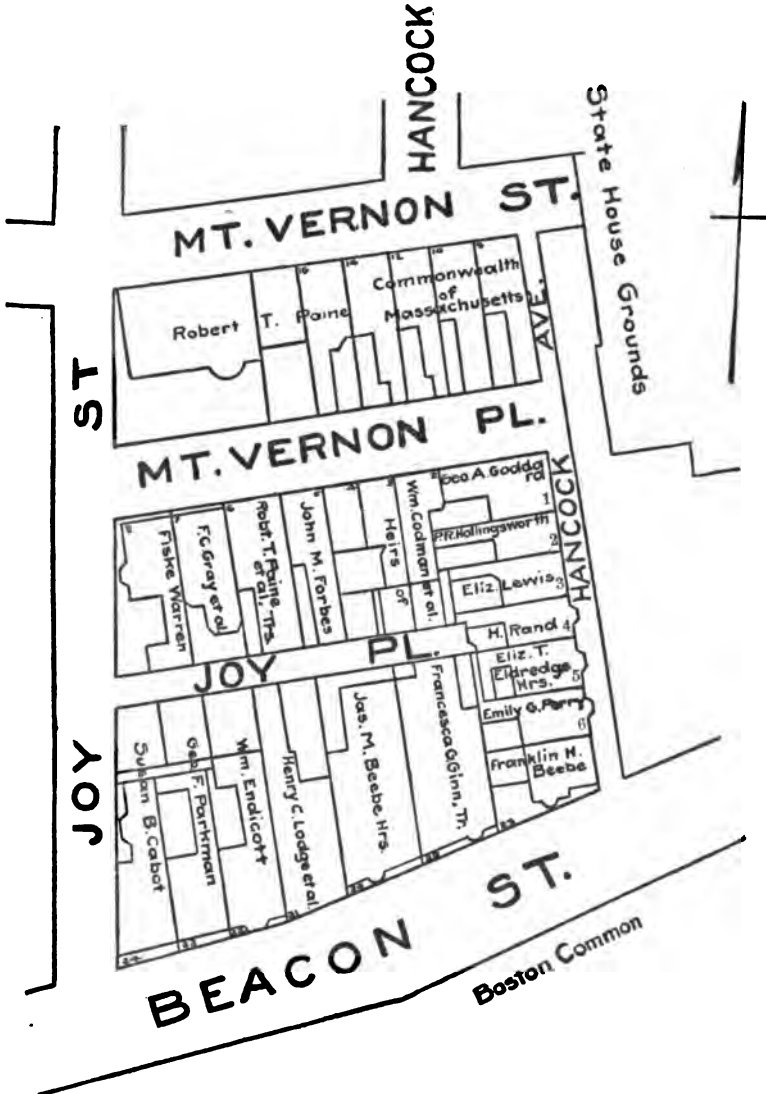
*C. C. Read*, for the petitioner Read.

*R. G. Dodge*, Assistant Attorney General, *& F. T. Field*, for the Commonwealth.

BARKER, J. The question is whether on June 2, 1899, when St. 1899, c. 457, went into effect, limiting the height of buildings in the vicinity of the State House the lots of the petitioners were subject to a restriction under the provisions of St. 1892, c. 419, § 25, as amended by St. 1894, c. 448, § 9, such that no structures exceeding two and one half times the width of Hancock Avenue measured as provided in the last named statute, except church spires, could be erected on the land. Those provisions so far as is now material are that “no building or other structure hereafter erected, except a church spire, shall be of a height exceeding two and one half times the width of the widest street



on which the building or structure stands, whether such street is a public street or place, or a private way." Each of the lots adjoins the State House grounds, a strip of which eight feet wide



in front of the petitioners' lots, and extending northerly to Mount Vernon Street and southerly to Beacon Street, is surfaced with brick, is used by the occupants of the premises which



abut upon it on the west and by the public as a foot path, is separated from the rest of the State House grounds by a fence, and is known as Hancock Avenue. The respondent contends that Hancock Avenue is a street within the meaning of the provision quoted, and that as the street is the only one on which the lots abut and is but eight feet wide, the height of buildings to be erected on the lots, if built without a setback, is restricted to twenty feet.

When the provision quoted went into effect the State House grounds on the east of the petitioners' lots were open bearing no structures except fences, statues and fountains for a long distance to Mount Vernon Street after its bend to the south to intersect Beacon Street. The south front of the State House was so esteemed that it is impossible to conceive that any Legislature contemplated that the State House grounds in front of the petitioners' lots would not remain always unoccupied with buildings. There are three other similar lots between the lots at the corners of Mount Vernon Place and of Beacon Street. The presence of buildings only twenty feet in height on those five lots, both by their incongruity with their surroundings and by leaving unmasked the rear of buildings on Beacon and Joy Streets and Mount Vernon Place, would detract much from the beauty of the outlook from the State House and its main approach, and would disfigure that section of Boston. At the same time such a restriction as is contended for by the respondent would be absurd in its relation to the general purposes of the legislation of which the provision in question is a part. The Legislatures of 1892 and 1894 therefore cannot have had any actual intention to restrict to twenty feet the height of buildings to be erected on the lots in question. Nor do we think that construction should be given to the language used, when applied to the strip of ground known as Hancock Avenue.

It is not every strip of land over which certain individuals and the public have a right to travel, even if the strip is laid out for travel and wrought and kept in repair by public officials, that in any sense fairly can be called a street, even if the strip serves as a means of communication between public highways. *Oliver v. Worcester*, 102 Mass. 489. *Sullivan v. Boston*, 126 Mass. 540. *Clark v. Waltham*, 128 Mass. 567. *Steele v. Boston*, 128 Mass.



588. *Veale v. Boston*, 185 Mass. 187. *Lincoln v. Boston*, 148 Mass. 578, 580. Looking at the history of Hancock Avenue we think it is merely a part of the State House grounds over which certain individuals by virtue of their relations to lots abutting on the avenue, and the public, have the privilege ordinarily of passing, on foot, and that the avenue is not a street within the meaning of St. 1892, c. 419, § 25, as amended by St. 1894, c. 448, § 9.

The principal circumstances are these. The State House grounds as conveyed to the Commonwealth in 1795 were bounded north and east by Mount Vernon Street, at one time called Sumner Street, on the south by Beacon Street and on the west by Governor Hancock's garden. In 1824 the garden having passed into other ownership the Legislature appointed a joint committee to confer with the proprietors of the lands adjoining the State House yard on the westerly side and to arrange a plan with them that their buildings should be so placed as not to injure the beauty or value of the public lands. This committee reported a resolve which became Res. 1824, c. 20, authorizing the appointment of commissioners with power to negotiate with the proprietors relative to the manner in which their buildings should be erected, and relative to the straightening of the line of the westerly boundary of the State House yard with power to exchange lands "and with full power and authority to lay out and establish a convenient sidewalk on the Commonwealth's lands for the accommodation of said proprietors, on such terms, and under such restrictions as they shall think will preserve the beauty of the public lands, and secure the interest of the Commonwealth." The doings of the commissioners were to be binding when approved by the Governor with the assent of the Council.

The resolve did not authorize the commissioners to lay out a way for the use of the public, but only to "lay out and establish a convenient sidewalk on the Commonwealth's lands for the accommodation of said proprietors." The commissioners did not themselves lay out or establish any sidewalk. Their report shows that they agreed with the proprietors that the latter should "at their own expense lay out and entirely finish a foot walk or passageway of eight feet in width on the extreme west



land of the State House yard." The same agreement contained many other terms, among which was one requiring the proprietors to erect an iron fence like that at the east end of the State House yard, with a double iron gate on the east side of the foot way opposite the west door of the State House. The term looking to the use of the way by the public is this: "which foot way shall at all times forever hereafter be free for the use of the proprietors and occupants of the aforesaid lands adjoining the west end of the State House yard, and to the citizens of the Commonwealth at large when not interdicted by the Governor and Council or Legislature on special occasions, the right to do which together with the fee of said passageway is hereby expressly reserved, and also the right hereafter to make such alterations in said foot way as the public accommodation may require."

Another term is that the proprietors never shall permit a building to be erected "contageous [contiguous] to said yard or avenue, that shall by the Governor and Council be adjudged a nuisance to the State House from offensive smell or noise; who upon due notice to said proprietors or occupants of said land after satisfactory investigation, shall have full right and authority to decide thereon, and to suspend the use of said foot walk and avenue, by an order, till such time as such nuisance shall be removed."

We do not think it was the intention of the Legislature by the Resolve of 1824 to allow the commission to lay out and establish a way in any such sense as is ordinarily meant by the use of that phrase. That would be to give to the municipal authorities of Boston jurisdiction over a portion of the State House grounds, which we think never could have been intended. Nor did the commissioners attempt to lay out and establish a way in any such sense. They merely authorized the proprietors to grade, work and cover the walk by the side of the State House grounds, and agreed with them that the proprietors and the public, ordinarily, when not forbidden as they might be on special occasions, might use that part of the State House grounds for foot travel. If the commission had power to establish a way in the sense contended for by the respondent, it could not delegate that power to the proprietors, and it did not itself exercise it. The stipulation



that the use of the walk might be interdicted on special occasions or if the Governor and Council adjudged that there was a nuisance upon the land of the proprietors is inconsistent with the contention that it was meant by the Legislature or the commission to lay out and establish a way in the ordinary sense.

The provision for a fence does not militate against our construction. Such a fence was necessary to make the yard symmetrical, and also like the similar fence on each side of the central walk leading from Beacon Street through the grounds to the south entrance of the State House to preserve the beauty of the grounds. For these reasons we think Hancock Avenue is not a street within the meaning of St. 1892, c. 419, § 25, as amended by St. 1894, c. 443, § 9.

The petitioners' lands not being under a restriction against the erection of buildings of a greater height than two and one half times the width of Hancock Avenue, each petitioner is entitled to judgment in the larger sum fixed by the report.

*So ordered.*

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### JOHN J. BRIGGS vs. BOSTON AND MAINE RAILROAD.

Middlesex. May 18, 1905. — June 21, 1905.

Present: KNOWLTON, C. J., BARKER, HAMMOND, LORING, & BRALEY, JJ.

#### *Negligence, Contributory.*

If the rider of a bicycle, when three hundred feet from a railroad crossing with four tracks over which trains pass very frequently, seeing the gates down dismounts and talks to a friend, and ten minutes later, after the gates have been raised and lowered again, sees them beginning to rise, the gateman raising them about two thirds up to allow two women to pass, and if in the meantime the bell of an engine attached to a train waiting near the crossing in full view of the bicycle rider begins to ring indicating that the train is about to start, and the rider mounting his bicycle rides toward the crossing looking on the ground straight ahead, and is struck on the head and knocked down by one of the gates while being lowered, he cannot be found to be in the exercise of due care.

TORT for personal injuries from being hit on the head and knocked to the ground by a gate at a crossing of the defendant on Moody Street in Waltham while the plaintiff was approach-



ing the crossing on a bicycle between six and seven o'clock on the evening of May 8, 1908. Writ dated November 5, 1903.

In the Superior Court *Sheldon, J.* ordered a verdict for the defendant, and reported the case for determination by this court. If on the evidence the plaintiff was entitled to have his case submitted to the jury, a new trial was to be granted; otherwise, judgment was to be entered on the verdict.

*J. W. Wellington*, for the plaintiff.

*G. F. Richardson, L. T. Trull & F. N. Wier*, for the defendant.

KNOWLTON, C. J. The plaintiff was riding on his bicycle in Waltham, along a street which crossed the defendant's railroad, on which, at that point, were four tracks where trains passed very frequently. When he was about three hundred feet from the crossing, he discovered that the gates were down, and he rode his bicycle to the curbstone and there engaged in conversation with one McGluichey, who stood upon the sidewalk in front of the building in which his office was located. He continued the conversation about ten minutes. During the first three minutes the gates were down, then they went up entirely and remained up two or three minutes, then they were lowered while an express train passed. In the meantime a local train entered the station and stopped at a point from fifty to one hundred feet from the crossing. It was daylight, and the engine and the whole train were in full view of the plaintiff while he stood talking with McGluichey. The gates were then down, and the gateman allowed them to remain down while a flagman attached lanterns to the ends of them. As two women were apparently desirous of passing, he raised the gates about two thirds up and allowed them to pass. Then the bell of the engine began to ring, indicating that this train was about to start, and the gateman, as soon as he heard the bell on the local train, reversed the direction of the gates and began to lower them. The plaintiff, who had started to ride over the crossing, was hit on the head and knocked down into the street by one of the gates. The approaching train was all the time in full view. The continuous ringing of the engine bell was in his hearing, and other bells were ringing on the gates during all the time that they were descending. No bell rang while the gates were going up.



The plaintiff testified that as he saw the gates going up, he jumped on his bicycle and rode towards the crossing, that as he rode he was looking on the ground, straight ahead, and did not see whether the gates were being lowered or whether the local train was moving, and did not hear, or listen to hear, the bells on the gates or the bell on the engine, or know whether they were ringing or not. He further testified that he knew that trains passed very frequently over this crossing, going both east and west; that the whole of the local train could be seen the entire distance between where he stood with McGluichey and the crossing; that there were buildings on the other side of the street which obstructed the view of the tracks on that side of the crossing until he came within a few feet of the tracks. He also testified that he could have stopped his bicycle at any time within a distance of thirty feet.

We are of opinion that there was no evidence to warrant a finding that the plaintiff was in the exercise of due care. While the fact that the gate was going up when he started to go across was proper to be considered, it did not justify him in shutting his eyes and ears to all the other sights and sounds which should have shown him that he could not safely go forward. His testimony, in connection with the undisputed facts as to the situation and the dangerous conditions at the crossing, shows that he was entirely inattentive, and was not in the exercise of ordinary care. The case resembles in some of its features *Sewell v. New York, New Haven, & Hartford Railroad*, 171 Mass. 302. See also *Creamer v. West End Street Railway*, 156 Mass. 320, 324; *Chase v. Maine Central Railroad*, 167 Mass. 383, 387.

*Judgment on the verdict.*



## THOMAS J. QUINN vs. SMITH P. BURTON, JR.

Suffolk. January 8, 1905. — June 22, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.*Agency. Broker.*

In an action by a broker for a commission for procuring an exchange of real estate the plaintiff contended that the customer, alleged to have been procured by the plaintiff, told his broker that he was ready to make the exchange in question and that the broker told this to the plaintiff and the plaintiff told the defendant who refused to go on with the trade. *Held*, that it was not necessary to consider what the rights of the parties would have been if the customer after telling his broker that he would make the exchange repudiated the transaction, as the evidence would not warrant a finding that the customer told his broker that he would make the exchange.

CONTRACT by a real estate broker for a commission in procuring an exchange of real estate. Writ dated January 6, 1903.

In the Superior Court *Wait*, J. refused to order a verdict for the defendant, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of \$1,609; and the defendant alleged exceptions.

The following is a statement of the evidence held by this court not to warrant a finding that the alleged customer told his broker that he would make the exchange in question:

The alleged customer in the case at bar was one Shapleigh. He had told one McDonald that he would like to dispose of two houses owned by him, by way of exchange. These two houses were situated on Commonwealth Avenue in Boston and were valued at \$40,000 each, and each was subject to a mortgage for \$25,000. The defendant's farm was free from incumbrances and was valued by him at \$35,000. The plaintiff testified that he told the defendant that Shapleigh would not go out to look at the farm unless the defendant was willing to convey his farm for the equity in the two houses without any payment by Shapleigh, and that the defendant assented to this; that thereupon Shapleigh went out to Reading, and after his return McDonald asked the plaintiff if the defendant's furniture at Reading went



with the farm ; that the defendant refused to throw in the furniture ; that on this being told to McDonald by the plaintiff McDonald said that they would accept it without ; that the plaintiff reported this to the defendant, who said that he should not go on with the trade, that he had talked with Shapleigh since and that he, the defendant, thought the plaintiff "could have got one house free and clear" and the defendant could have taken a mortgage back on his farm. The plaintiff testified that he then said that the deal was closed a week ago ; that he had not seen the defendant since ; that he wrote to the defendant, who replied that the plaintiff had no authority to trade his farm for anything less than \$35,000.

Up to this point there was no evidence that Shapleigh authorized McDonald to close the trade he undertook to close with the plaintiff. All that the plaintiff testified to was that McDonald told him that Shapleigh would not consider an exchange unless the defendant was ready to make the exchange without a payment by him, Shapleigh.

After the plaintiff had testified to these facts, McDonald testified to most of the facts above set forth, including Shapleigh's visit to Reading and the witness's call on the plaintiff to see if the furniture was included. McDonald then testified that on receiving this answer Shapleigh asked what he could sell the defendant's farm for and how much he could borrow on it ; that he told Shapleigh that he might not be able to sell it right away for cash, but that he could borrow on it and sell it later ; that the upshot of this conversation was that Shapleigh wanted him to raise a loan before he really took the title to the farm, and he said that if the plaintiff could do that he would make the trade ; and that thereupon McDonald told the plaintiff : "I thought we could close it up all right."

On cross-examination McDonald testified that he understood that to be Shapleigh's position, and that Shapleigh never said anything more authorizing him (McDonald) to close the trade.

Shapleigh then went on the stand as a witness for the defendant, and testified that he asked McDonald how much money he could raise on the defendant's farm, and that McDonald told him \$15,000, to which he answered : "That settles it, I don't want it." The only other testimony from Shapleigh was the



fact that he admitted on cross-examination that after this talk he went to the office of one Page, who had introduced him to McDonald, to talk about this matter and to see if Mr. Burton would make the exchange on certain conditions not stated.

The defendant then went on the stand and testified that he never authorized the plaintiff to offer his farm for the equity in the two houses unless he got \$5,000 to boot, and that he had since sold his farm to a third person.

Page then was called by the plaintiff, and testified that on the train coming in from Reading the talk was of an even exchange, and Shapleigh told him and McDonald that he would consider exchanging, and that he came into his (Page's) office every day or so in relation to the transaction. On cross-examination this witness testified "that he did not know what terms had been proposed by the defendant; that the trade, so far as he as a broker understood it, was a 'trade, the terms of which still remained to be arranged'; that coming in on the train that day he did not undertake to make any bargain with Shapleigh at that time, but left the matter open until the defendant could be consulted; that he tried to have Shapleigh say what he would do; that he did not reach the point of closing any trade with Shapleigh, and understood perfectly well 'that the matter lay open because of these unsettled things'; that the next day he saw Shapleigh who asked what the chances were of a trade going; that Shapleigh came in for some time right along every day or so to ascertain what was being done and there was no time, so far as he knew, when any definite arrangement was reached so far as his communication with Shapleigh was concerned; that three or four weeks after November 22, Shapleigh came in and the witness told him upon information which he had received from the other broker (McDonald) that the defendant would not trade; that coming down in the cars from Reading, Shapleigh said something to him about raising the eighteen or twenty thousand dollar mortgage on the place and that very likely he told him it could not be done."

The plaintiff on being recalled testified that Shapleigh said: "I think Mr. Burton played a dirty mean trick on us people to put us to the trouble of going out there to look that place over and then back out." This was denied by Shapleigh.



The case was submitted on briefs at the sitting of the court in January, 1905, and afterwards was submitted on briefs to all the justices.

*S. H. Tyng*, for the defendant.

*J. H. Murphy*, for the plaintiff.

LORING, J. This is an action brought to recover a broker's commission for procuring some one to make an exchange with the defendant for the defendant's farm in Reading.

No contract for an exchange was in fact made, but the plaintiff contends that he has made out a case within *Fitzpatrick v. Gilson*, 176 Mass. 477, and *Cadigan v. Crabtree*, 179 Mass. 474, 481.

The case at bar is unlike *Fitzpatrick v. Gilson* in one respect. In the case at bar no customer was in fact introduced to the defendant, and the terms of a trade were not in fact arranged, which trade subsequently fell through not through the fault of the customer but through the fault of the defendant.

More than that, the person who, the plaintiff contends, was the customer secured by him testified that he never was willing to make the exchange.

All that the plaintiff has asserted is that the customer told his broker that he was ready to make the exchange, and the broker told the plaintiff and the plaintiff told the defendant; and thereupon the defendant refused to go on with the trade.

It might be argued that a broker does not earn his commission until he produces a customer, and that in the case at bar he had not done so because the customer refused to honor his broker's statement that he would make the exchange; that in such a case what the defendant got from the plaintiff was a lawsuit and not a customer. But we do not find it necessary to make a decision on that point because we are of opinion after a careful examination of the evidence that the jury were not warranted in finding that the customer told his broker that he would make the exchange.

*Exceptions sustained.*



**STILLMAN G. SYMONDS vs. PATRICK J. RILEY.**

**Essex. January 10, 1905. — June 22, 1905.**

**Present: KNOWLTON, C. J., MORTON, LATHROP, LORING, & BRALEY, JJ.**

*Bills and Notes.*

A check indorsed in blank by the payee and delivered in exchange for the note of another person in pursuance of an arrangement for the accommodation of the drawer of the check, deposited by the person who receives it in a bank to his credit in the ordinary course of business and immediately drawn against by him, is a negotiable instrument and subject to the law relating to such instruments, and the bank taking the check in good faith and paying full value for it is not affected by equities between the drawer of the check and the person depositing it. In such a case a stranger to the original transaction taking up the check by paying its full amount to the bank after it has been dishonored is entitled to all the rights of the bank against the drawer.

MORTON, J. This is an action of contract to recover upon four checks all drawn by the defendant to the order of one K. F. Gorman and indorsed by her. One of them was drawn on the Appleton National Bank of Lowell and the others upon the Second National Bank of Manchester, New Hampshire. Three of them were indorsed by the defendant before delivery as P. J. Riley and Company. They were drawn under the following circumstances. K. F. Gorman the payee was a clerk in the office of one Sibley. There was an arrangement between Sibley and the defendant for an exchange of checks and notes for the accommodation of the defendant. The checks in suit were given pursuant to this arrangement. The defendant made them payable to Miss Gorman of his own motion and they were indorsed by her and deposited in the National Exchange Bank of Salem, of which the plaintiff was cashier, to the credit of Sibley as cash, and Sibley was permitted by the cashier to draw against them to an equal amount. When the checks became due they were not paid by the defendant and were duly protested. Thereupon the bank insisted that the plaintiff should make good the checks and he did so and took the checks. This was after the checks had been dishonored. The defendant neglected to pay them on the ground that he was entitled to set off against them certain



indebtedness which he claimed was due him from Sibley on account of checks and mercantile transactions. The case was sent to an auditor who found and reported in favor of the plaintiff. At the trial the plaintiff put in the checks and the auditor's report and rested. The defendant thereupon asked the judge to rule that the plaintiff could not recover and offered to show that when the checks were delivered to Sibley he was indebted to the defendant in a sum greater than the total amount of the checks, and asked the judge to rule that "it being undisputed that the plaintiff took said checks twenty days after their protest, he took them subject to the equities between the defendant and said Sibley." The judge declined to rule as requested or to admit the evidence that was offered, and directed the jury to find for the plaintiff for the amount found due by the auditor with interest. The case is here on exceptions by the defendant to the refusal to rule as requested and to the rulings that were made.

We think that the rulings were right. The checks were negotiable instruments (*Bill v. Stewart*, 156 Mass. 508) though differing somewhat from negotiable promissory notes, and as such were subject to the law relating to negotiable paper. They were dishonored when the plaintiff took them, and the defendant contends that they were subject to any equities existing between him and Sibley. They were not made payable to Sibley, and whether in an action against him by the payee, Gorman, the defendant could have pleaded in set-off Sibley's alleged indebtedness to him, as to which see *Tyler v. Boyce*, 135 Mass. 558, *Sheldon v. Kendall*, 7 Cush. 217, and R. L. c. 174, § 5, it is not necessary to consider. We assume for the purposes of this case that he could. But that does not help the defendant. The checks were deposited in the bank to Sibley's credit in the usual course of business. The bank took them in good faith before they were overdue and paid full value for them. It had no notice of any alleged equities between the defendant and Sibley and in an action upon the checks against the defendant could have recovered the full amount of them. The checks being unaffected in the hands of the bank by the equities, if any, between the defendant and Sibley, they were unaffected by such equities in the hands of the plaintiff. The plaintiff took



such title as the bank had. If the bank had a perfect title, as it did, he took the same title and became invested with all the rights of the bank. *Thompson v. Shepherd*, 12 Met. 311. *Bank of Sonoma County v. Gove*, 63 Cal. 355. *Howell v. Crane*, 12 La. An. 126. *Wilson v. Mechanics' Savings Bank*, 45 Penn. St. 488, 494.

There is nothing to show that he had notice when the checks were transferred to him of any alleged equities or defences on the part of the defendant. But even if he had had such notice it would not have availed the defendant. *Thompson v. Shepherd*, *supra*. *Peabody v. Rees*, 18 Iowa, 571. It is unnecessary therefore to inquire into or consider whether there was any such condition of things as would have constituted a good defence to the checks on the part of the defendant either by way of set-off or otherwise to an action on them by Sibley, and the evidence that was offered was rightly excluded.

The defendant further contends that the auditor's report should have been submitted to the jury. But, the circumstances in regard to the taking and the transfer of the checks by the bank as found by the auditor being undisputed, there was nothing to submit to the jury. The question became one of law, and the judge rightly directed the jury to return a verdict for the amount found due by the auditor, which was the amount of the checks. *Peru Steel & Iron Co. v. Whipple File & Steel Manuf. Co.* 109 Mass. 464.

*Exceptions overruled.*

*N. D. Pratt & J. J. Devine*, for the defendant.

*D. N. Crowley*, for the plaintiff.



## THOMAS QUINN vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 13, 1905. — June 22, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, &amp; BRALEY, JJ.

*Negligence, Contributory.*

A bridge carpenter employed with others by commissioners in patching the flooring of a bridge over which electric cars are running, if being between the sidewalk and the nearest rail of the track and stooping down on one knee near the track to mark a plank, he is struck in the face by the running board of an open electric car, which he would have seen approaching if he had looked up and which he would have heard approaching if he had stopped to listen, cannot be found to be in the exercise of due care.

TORT for personal injuries from being struck by an electric car of the defendant while at work with others in patching the flooring of the Harvard Bridge between Cambridge and Boston. Writ dated November 9, 1901.

In the Superior Court the case was tried before *Sherman, J.*, who ordered a verdict for the defendant, and by agreement of the parties reported the case for determination by this court. If on the evidence the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of \$1,500; otherwise, judgment was to be entered on the verdict for the defendant.

*J. J. Corbett*, for the plaintiff.

*E. P. Saltonstall*, (*S. H. E. Freund* with him,) for the defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff, a bridge carpenter sixty-five years old, by being struck by one of the defendant's cars. At the time of the injury the plaintiff and two others were in the employ of the Boston and Cambridge bridge commission, and were engaged in patching the flooring of Harvard Bridge. The plaintiff was between the sidewalk and the outer rail of the inbound track, and was near the track stooping down on one knee, marking a plank, when the running board of the car struck him in the face. He was facing towards Cambridge, from which place only cars could come which could do him any injury. There was nothing to:



prevent his seeing in the direction of Cambridge a distance of about two hundred and seventy yards. There was nothing to prevent his looking. He testified that he knew that if a car came along he would be hit; that if he had stopped to listen he could have heard the car coming; that there was no trouble with his hearing; that he was facing Cambridge when he was marking; that he had his face toward the car all the time, which nevertheless hit him; that he did not know of any trouble with his eyes; that he might have seen the car had he looked up. In response to a question by the trial judge, he testified that there were three working at that place, and that each man looked out for himself.

The accident occurred about half past eight o'clock in the morning on May 8, 1901, and none of the witnesses called by the plaintiff testified that there was anything to prevent his seeing or hearing the approaching car. The only conflict of evidence was on the question of the speed of the car and whether the gong was rung.

On the uncontradicted evidence, we are of opinion that the judge was right in directing a verdict for the defendant. The plaintiff was working in a dangerous place, and was looking out for himself. He knew the danger of being too near the rail, for he testified that he was struck by a car near the same place five years before. The evidence shows that the plaintiff was not in the exercise of due care. *Lynch v. Boston & Albany Railroad*, 159 Mass. 536. *Tumalty v. New York, New Haven, & Hartford Railroad*, 170 Mass. 164. *Morey v. Gloucester Street Railway*, 171 Mass. 164. *Roberts v. New York, New Haven, & Hartford Railroad*, 175 Mass. 296. *Mathes v. Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416. *Itzkowitz v. Boston Elevated Railway*, 186 Mass. 142. See also *Lyons v. Bay Cities Consolidated Railway*, 115 Mich. 114; *Eddy v. Cedar Rapids & Marion City Railway*, 98 Iowa, 626.

*Judgment on the verdict for the defendant.*



## DANIEL F. GRIFFIN vs. CITY OF BOSTON.

Suffolk. March 14, 1905. — June 22, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; HAMMOND, JJ.

*Evidence. Witness.*

When a witness in an action of tort for personal injuries has been cross-examined at length in an attempt to show that the account of the accident given by him in his direct examination is a recent fabrication created under the influence of the attorney for the party calling him, that party may call as a witness a person employed to investigate the case when notice of the accident was received and show by him that the witness cross-examined had given the same account of the accident soon after it occurred.

LATHROP, J. When this case was last before us, it was upon a ruling of the judge of the Superior Court that, on the plaintiff's evidence, he was not entitled to recover. We were of opinion that there was evidence for the jury. *Griffin v. Boston*, 182 Mass. 409. At the new trial the jury returned a verdict for the defendant, and the case comes before us on the plaintiff's exceptions.

The plaintiff's case rests upon his being a traveller on the highway on November 4, 1897, and being struck on the head by the handle of a truck on which a gravel heater rested, the handle being insecurely fastened in a vertical position by a piece of rotten wire; and there was evidence that the truck had remained in that position for a week before the accident. The plaintiff was a boy about eight years old at the time of the accident.

The defendant's evidence tended to show that the plaintiff was not a traveller on the highway; that he was playing in the street at or near the heater just before he was hurt; that when he met with the injury he was in the act of climbing up the handle of the heater, and the wire broke and the handle and the boy fell to the stone pavement, causing the injuries complained of.

The defendant called as a witness one Herbert O'Reilly, who testified that at the time of the trial, October 5, 1903, he was thirteen years old; that he knew the plaintiff when he was hurt; that the witness was playing round the heater. When asked,



"What did you see happen while you were playing?" he answered: "Dannie [the plaintiff] was going — shinning up the pole and the wire broke and he fell down." The witness was then cross-examined at length.

Later on in the trial the defendant called one Devitt, a lieutenant of police. He testified that he had been detailed to serve the committee on claims of the defendant city, and that it was his duty, with his associates, to investigate claims against the city, after notice was received; that he investigated this case and had in his possession his original notes; that he saw the boy O'Reilly, who told him that the plaintiff was "swinging on the handle, and the wire broke and it fell and he fell." This evidence was admitted subject to the plaintiff's exception.

On this matter the judge instructed the jury as follows: "It was suggested to you in the course of the argument that while the statement which one of the boys had given to the officer was read in your presence the other statements were not read; and perhaps, in view of that statement, I ought to say what the rights of counsel are with regard to the introduction of statements in those cases, when they are admissible and when they are not. A witness, in the first instance, is called upon to state what occurred at a particular time. If that is all there is to the case, his counsel, who calls him, is not permitted to bring in other testimony — that he said the same thing shortly after the accident, for the purpose of corroborating the statement of the witness on the stand. That is not permissible in the way of corroboration; and, therefore, ordinarily when a witness has testified what occurred a number of years ago, if he has made a statement and it appears he made a statement, and made one shortly after the accident, that cannot be admitted in evidence. But there is one exception to that rule, and that is when it appears from the cross-examination, or otherwise, that it may be the purpose of the cross-examining counsel to show that the testimony was a recent invention or impressed upon a witness by some undue influence; in such a case it is permissible for the purpose of restoring the credit of the witness to show that the testimony he makes upon the stand is like the statement which he made shortly after the accident. Upon that ground I admitted the statement made by the O'Reilly boy to Devitt soon



after the accident, although I excluded the other statements made to Devitt by the other witnesses."

No exception was taken to the charge, and the only exception is to the admission of the testimony of Devitt. The plaintiff's counsel contended at the argument before us that the purpose of the cross-examination was simply to test the recollection of the witness; but we are of opinion that while some of the questions and answers were for this purpose, the purpose also existed to impeach the witness O'Reilly, and to show that his testimony was a recent fabrication created under the influence of the attorney for the defendant in his office, shortly before the trial.

The general rule is as stated by the judge presiding at the trial. *Howe v. Thayer*, 17 Pick. 91, 96. *Deshon v. Merchants' Ins. Co.* 11 Met. 199, 209. *Ashley v. Wolcott*, 11 Cush. 192, 196. *Commonwealth v. Jenkins*, 10 Gray, 485. *Burns v. Stuart*, 168 Mass. 19. *McDonald v. New York Central & Hudson River Railroad*, 186 Mass. 474, 477, 478, and cases cited.

To the general rule there are exceptions, one of which applies to the case at bar, and which is thus stated by Mr. Justice Bigelow in *Commonwealth v. Jenkins*, 10 Gray, 485, 489: "The decision of the point raised in this case is not to be understood as conflicting with a class of cases, in which a witness is sought to be impeached, by cross-examination or by independent evidence, tending to show that at the time of giving his evidence he is under a strong bias or in such a situation as to put him under a sort of moral duress to testify in a particular way. In such case, it is competent to rebut this ground of impeachment and to support the credit of the witnesses by showing that, when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those which he has given at the trial." See *Commonwealth v. Wilson*, 1 Gray, 337, 340; *Hewitt v. Corey*, 150 Mass. 445; Wigmore, Ev. § 1129, and cases cited in note 1.

*Exceptions overruled.*

*J. P. Fagan*, (*T. G. Connolly* with him,) for the plaintiff.

*A. L. Spring*, for the defendant, submitted a brief.



**WILLIAM G. STEEL & another vs. H. K. WEBSTER & others.**

**Essex. March 15, 1905. — June 22, 1905.**

**Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & HAMMOND, JJ.**

*Corporation. Sale, Rescission.*

One who has sold goods on credit to a domestic corporation deceived by a false statement of its assets and liabilities filed by its officers under Pub. Sts. c. 106, § 54, with the purpose of giving the corporation a credit to which it was not entitled, may rescind the sale and maintain an action of replevin for the goods.

REPLEVIN for twenty-one cases of wool tops. Writ dated January 8, 1901.

The answer denied that the goods replevied were the property of the plaintiffs, and alleged that they were the property of the Globe Worsted Mills, of which corporation the defendants were the assignees under an assignment dated December 21, 1900.

At the trial in the Superior Court before *Stevens, J.*, without a jury, the auditor's report was the only evidence introduced. The auditor found that the certificates filed by the Globe Worsted Mills in 1899 and 1900 under Pub. Sts. c. 106, § 54, were prepared by the treasurer of that corporation knowing them to be grossly false, for the purpose of giving the corporation a credit to which it was not entitled, and that these certificates were relied upon by the plaintiffs in the manner stated in the opinion.

The defendants asked the judge to rule as follows: "1. Upon the auditor's report the defendants are entitled to a finding in their favor and a judgment for return of the goods replevied. 2. Upon the auditor's report and the facts reported therein, together with all legitimate inferences to be drawn from such facts, the plaintiffs would not be entitled to a judgment in their favor, as reported by the auditor. 3. The filing of the certificate of condition by the defendant corporation in itself would not constitute such fraud or fraudulent representations as would entitle the plaintiffs to rescind the same and replevy the property sold, even although such certificate was false within the knowl-



edge of the officers of the corporation, and was intended to give the corporation an extended credit and to deceive the public."

The judge refused to rule as requested, and found for the plaintiffs with nominal damages. The defendants alleged exceptions.

*W. S. Knox & W. Coulson*, for the defendants.

*G. L. Mayberry & W. M. Morgan*, for the plaintiffs.

LATHROP, J. The auditor has found in this case that the plaintiffs sold goods to a corporation represented now by the defendants; that before making the contract of sale the plaintiffs inquired through a mercantile agency as to the financial condition of the corporation, and received in return a statement in detail of the assets and liabilities of the corporation contained in its annual returns of condition, in pursuance of the requirements of the Pub. Sts. c. 106, § 54; that these returns were knowingly false and made for the purpose of giving the corporation a credit to which it was not entitled, and to deceive the public and persons from whom the corporation might seek and obtain credit. The questions are whether the plaintiffs can avail themselves of these false statements, they relying on the same and making the sale in consequence thereof, and whether they can rescind the sale and maintain an action of replevin for the goods.

No question is made that the requirements of the Pub. Sts. c. 106, § 54, apply to the corporation in question. This requires an annual certificate "signed and sworn to by its president, treasurer, and at least a majority of its directors," and stating among other things "the assets and liabilities of the corporation, in such form and with such detail as the commissioner of corporations shall require or approve." See also Sts. 1887, c. 225; 1890, c. 199; 1896, c. 369; R. L. c. 110, § 51; St. 1903, c. 437, § 45. There are also many acts preceding the Public Statutes.

In *Fogg v. Pew*, 10 Gray, 409, 415, in reference to the return required from an insurance company to the secretary of the Commonwealth, it was said by Mr. Justice Bigelow: "The return made by the corporation to the secretary of the Commonwealth, in compliance with the provisions of the statutes, was irrelevant and immaterial to the issue before the jury, unless accompanied by further evidence that the defendant saw or knew of such



statement, and was thereby deceived, and entered into contracts of insurance with the corporation, relying in some degree on the statements which it contained."

In *Thayer v. New England Lithographic Steam Printing Co.* 108 Mass. 523, 528, Mr. Justice Wells, speaking of the St. of 1862, c. 210, requiring a certificate to be filed, said: "The purpose is to secure, to the public, information, furnished by such a statement, of the character and condition of the corporation, so that those who may deal with it may have knowledge, or means of knowing those facts."

In *Felker v. Standard Yarn Co.* 148 Mass. 226, it was said by Mr. Justice Charles Allen, speaking of the Pub. Sts. c. 106, § 54: "No doubt one important reason, perhaps the principal reason, for the statutory provisions is to enable persons who may have occasion to deal with corporations to ascertain their condition, and their title to credit." See also *Heard v. Pictorial Press*, 182 Mass. 530.

*Hunnewell v. Duxbury*, 154 Mass. 286, is readily distinguishable from the case at bar. That was a case of a foreign corporation, which by the St. of 1884, c. 330, was required to file a certificate containing a statement of the amount of its capital stock, and the amount paid in thereon to its treasurer, and how paid, as a condition precedent to its right to do business in this State. It was not required to file a statement of its assets or liabilities. As the court said, in speaking of the certificate: "Its design was not to procure credit among merchants, but to secure the right to transact business in the State."

We have no doubt in the case at bar that the judge in the court below rightly found for the plaintiffs, with nominal damages.

*Exceptions overruled.*



## JAMES DAWSON vs. LAWRENCE GAS LIGHT COMPANY.

Essex. March 15, 1905. — June 22, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; HAMMOND, JJ.

*Negligence, Employer's liability.*

A lamp trimmer employed to clean electric lights who never has worked as a line-man and has had nothing to do with the erection or care of the poles does not assume the risk of an injury from the fall of a pole while he is on it caused by the pole being rotten below the surface of the ground.

LATHROP, J. This is an action of tort for personal injuries from the fall of a pole erected by the defendant for the support of wires and an electric arc lamp. The declaration contains two counts under the R. L. c. 106, § 71, and one at common law. While the pleadings are referred to in the bill of exceptions, no question is made in regard to them.

It appeared in evidence that the pole was of hard pine, squared, about twenty-eight feet high; and, in the spring before the accident, it had been painted by the employees of the defendant from the surface of the ground to the top. It was provided with iron spikes or bolts inserted upon alternate sides of the pole for climbing. It had one arm extending into the street, but the electric light was placed on the top. Two electric wires ran from it to poles on the other side of the street.

The accident happened on July 9, 1903. At this time the plaintiff was forty-one years of age, and weighed about one hundred and seventy-five pounds. The plaintiff entered the employ of the defendant in September, 1902. Before this he had had no experience in this kind of work. He was employed as a lamp trimmer and his work was each day to clean the electric lamps, remove the old carbons and insert new ones. He was shown his work and what he had to do. About one month before the accident, his route was increased, so that twenty-nine more poles, one of which was the pole that fell, were added to his route. The plaintiff had in all something over fifty poles to look after, but out of these there were only eighteen that he had to climb.



On the rest of the poles the lamps could be lowered by means of a rope.

Upon the day of the accident he ascended the pole in question, by placing a ladder against it and then climbing up upon the iron bolts or spikes until he got to the top. Then there was a crash and the pole fell, and the plaintiff was thrown to the sidewalk and sustained the injuries complained of. The plaintiff had ascended the pole in the same way every day for about a month before the accident, had never seen anything the matter with the pole, or anything to call his attention to it, and never had been instructed to report any defect or trouble with the pole.

The plaintiff testified that at the time of the accident there were five or six linemen in the employ of the defendant; that the linemen erected and took down the poles and strung the wires; that he had nothing to do with their erection or care; that he never had worked as a lineman or painted any poles; and that his duties were as previously stated. It appeared that the pole was not gusted.

Several witnesses were called as to the condition of the pole immediately after the accident. They all agreed that it was rotten below the surface of the ground. Some placed the rotten spot at two or three inches below the surface, and some at five or six inches.

One Sargent, the superintendent of the defendant, called as a witness by the plaintiff, testified on direct examination that there were six or seven linemen in the employ of the defendant, whose duty it was to erect and take down poles, to string the wires and paint the poles; that the poles were not painted at any set time but when they needed it; that they were painted from the surface of the ground to the top, the intention being to cover all that was exposed to the weather; that the linemen were provided with small poles with steel points at one end, which could be and were used for the purpose of determining whether the electric light poles were in good condition; that it was the duty of the linemen to examine the poles and see their condition; that this can be done by prodding at the bottom of the poles, and that their condition can be detected by prodding down into the ground if it is not too far down, and that he did not think



that five or six inches below the surface of the sidewalk was too far down.

On cross-examination the witness testified that the pole was a square hard pine pole ; that he did not know what its life was, but knew that it had a life and ought to be inspected once in a while ; that he did not know how often the poles of the defendant were inspected at the time of the accident ; that there was no special time for the examination of poles, and no special interval between examinations.

The defendant introduced no evidence, and at the close of the plaintiff's testimony asked the judge to rule that there was no evidence which would authorize the jury to find for the plaintiff, and also asked that the judge direct a verdict for the defendant. The judge refused both of these rulings. The case was submitted to the jury under instructions, which were not otherwise excepted to, and the jury found for the plaintiff.

The contention of the defendant is that the danger of the pole falling was an obvious one ; that the plaintiff assumed the risk ; and that there was no evidence which would warrant the jury in finding that the defendant was negligent.

The defendant relies upon the case of *McIsaac v. Northampton Electric Lighting Co.* 172 Mass. 89, and *Tanner v. New York, New Haven, & Hartford Railroad*, 180 Mass. 572. These were cases of experienced linemen, as has been already pointed out in *Lord v. Wakefield*, 185 Mass. 214, 216, 217. In the present case, the plaintiff was not a lineman, but a cleaner of lamps. It was no part of his duty to inspect the poles. This duty the defendant had delegated to its linemen, as appears from the testimony of the superintendent of the defendant company. It was the duty of the defendant to furnish a safe place for the plaintiff to work ; and the duty of inspection which the defendant recognized could not by being delegated relieve the defendant from liability. There was no obvious risk which the plaintiff assumed. The danger was under ground. There was no evidence that the plaintiff knew that the life of a pole was limited. The superintendent knew this fact, but testified that he did not know what the life of this pole was, "but knew that it had a life, and ought to be inspected once in a while."

We are of opinion therefore that the defendant's requests for



instructions were rightly refused, and the case was properly submitted to the jury. *Chisholm v. New England Telephone & Telegraph Co.* 185 Mass. 82.

*Exceptions overruled.*

*J. G. Walsh*, for the defendant.

*J. P. Sweeney*, for the plaintiff.

MYRTLE S. DONALDSON vs. NEW YORK, NEW HAVEN, AND  
HARTFORD RAILROAD COMPANY.

Suffolk. March 22, 1905. — June 22, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Negligence, Employer's liability, Contributory. Evidence. Witness.*

In an action under St. 1887, c. 270, § 2, by the widow of a brakeman against the railroad company employing him for negligently causing his death, it appeared, that as the train on which the deceased worked came into a station of the defendant a man in the uniform of an employee of the defendant was seen standing on the front platform of the forward car where the deceased usually stood, that after the train stopped the deceased was found lying on the ground between the forward car and the tender of the engine with his head crushed and that he died soon after without regaining consciousness, that the deceased was an experienced brakeman, that it was his duty to couple and uncouple the engine and cars, but that it also was a part of his duty to let the conductor or engineer know if he went between the cars. *Held*, that there was no evidence from which a jury fairly could infer the cause of the accident or on which they could find that the deceased was in the exercise of due care.

The provision of R. L. c. 175, § 24, that a party may impeach his own witness by proof that he has at other times made statements inconsistent with his present testimony, does not make the inconsistent statements thus introduced evidence of the truth of the matter stated.

LATHROP, J. This is an action of tort brought by the widow of Joseph L. Donaldson under the St. of 1887, c. 270, § 2, to recover for the death of her husband while in the employ of the defendant as a brakeman. At the close of the plaintiff's evidence the judge before whom the case was tried in the Superior Court directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

The train upon which Donaldson was working ran between Marlborough and Mansfield. The train had two engines, and



Donaldson's position when the train was in motion was on the front platform of the forward car. There was evidence that as the train was coming into the station at South Framingham, a man in the uniform of a railroad employee was seen standing where Donaldson usually stood. After the train stopped, one of the brakemen, named Heath, started with his lantern to look under the cars to see that everything was right. He found Donaldson between the forward car and the tender of the engine, lying on the ground between the tracks, and it was discovered afterwards that his head was crushed. He was breathing, but was unconscious and died soon afterwards. Heath notified the conductor and the fireman of the engine next to the train that a man had been hurt and not to move the engine. The fireman gave the same warning to the engineer of the forward engine.

Donaldson was an experienced railroad man, having spent most of his life upon the Central Vermont Railroad, as brakeman and conductor, and later had come to the defendant road. He had been running on the train in question for two or three weeks.

There was evidence that it was Donaldson's duty to do the switching, coupling and uncoupling of the engine and cars, and to attach the steam hose which came from the engine. There was also evidence that after the train had stopped it came back a little, taking up the slack, as it was called. It also appeared in evidence that the rear cars were not sufficiently warmed, but there was no evidence that Donaldson knew this. The evidence was uniform that after the cars stopped nothing was done to uncouple the engines or the steam hose until after the accident.

The theory of the plaintiff is that Donaldson went between the tender and the forward car in the discharge of his duty. But there is no evidence of this. On the contrary there was a rule of the road, put in evidence by the plaintiff, which read as follows: "Never go between the cars for the purpose of coupling or uncoupling, or to make any adjustments, without first notifying the enginemen and properly protecting yourself." There was also evidence from the conductor of the train as follows: "It was a part of the brakeman's duty to let the conductor or engineer know if he went between the cars. Witness had warned Donaldson . . . more than once." There was no evi-



dence that Donaldson gave any warning that he was going between the cars. If therefore he went there voluntarily, he was not in the discharge of his duty, and was guilty of negligence.

An ingenious attempt has been made by the plaintiff to show by the testimony of some of the witnesses given at an inquest held soon after the accident, that their testimony there was not in all respects in accordance with their testimony at the trial, and an attempt has been made to argue the case on the testimony at the trial as corrected by the evidence at the inquest. The evidence at the inquest was admitted under the R. L. c. 175, § 24, which reads: "The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony."

The statute allows a party to contradict his own witness, but, in the language of Mr. Justice Endicott, in *Brooks v. Weeks*, 121 Mass. 433, "The contradiction can have no legal tendency to establish the truth of the subject matter of the statements." See also *Batchelder v. Batchelder*, 139 Mass. 1. In other words, such evidence, though it discredits the witness, does not have the effect of independent evidence. *Manning v. Carberry*, 172 Mass. 432.

Upon the evidence put in by the plaintiff there is nothing, in our judgment, from which a jury could fairly infer the cause of the accident, or that Donaldson was in the exercise of due care. It was purely a matter of conjecture. *Corcoran v. Boston & Albany Railroad*, 133 Mass. 507. *Riley v. Connecticut River Railroad*, 135 Mass. 292. *Shea v. Boston & Maine Railroad*, 154 Mass. 31. *Tyndale v. Old Colony Railroad*, 156 Mass. 503. *Irwin v. Alley*, 158 Mass. 249. *Chandler v. New York, New Haven, & Hartford Railroad*, 159 Mass. 589. *Geyette v. Fitchburg Railroad*, 162 Mass. 549. *Murphy v. Boston & Albany Railroad*, 167 Mass. 64. *Dacey v. New York, New Haven, & Hartford Railroad*, 168 Mass. 479. *Cox v. South Shore & Boston Street Railway*, 182 Mass. 497.

*Exceptions overruled.*

*G. F. Ordway*, for the plaintiff.

*J. L. Hall*, for the defendant, was not called upon.



## HERBERT J. HARWOOD vs. JAMES DONOVAN.

Suffolk. April 4, 1905. — June 22, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, &amp; BRALEY, JJ.

*Certiorari. Tax, Assessments for benefits.*

The writ of certiorari is not one of right, and will not be issued to quash a sewer assessment made under a statute afterwards held to be unconstitutional, where the petition for the writ is filed nearly six years after the assessment and it seems probable that there was some special agreement between the city and the petitioner's predecessor in title under which he was content with the assessment and did not wish to contest its validity, and where the petitioner himself has made without protest five of the ten payments into which the assessment has been apportioned and has made use of the sewer.

PETITION, filed July 15, 1904, for a writ of certiorari to quash a sewer assessment made on August 18, 1898, by the respondent's predecessor in office upon certain land of the petitioner on Blue Hill Avenue in Boston, then owned by Joseph A. Harwood, the petitioner's father and predecessor in title.

The case was heard by *Hammond, J.*, who made an order that the petition be dismissed, and at the request of the petitioner reported the case for determination by the full court, such entry to be made therein as upon the facts law and justice might require.

*W. Bolster*, for the petitioner.

*S. M. Child*, for the respondent.

BARKER, J. Under orders adopted by the board of street commissioners of Boston, relying on the authority of St. 1891, c. 323, and acts in amendment thereto, which orders were passed in the year 1895, and adjudicated that the public convenience and necessity required it, Blue Hill Avenue was laid out, relocated and ordered to be constructed in a certain manner which involved the building of a sewer within its limits. Under these orders the superintendent of streets constructed the avenue with the sewer, completing the work on August 18, 1898, and on that day he levied a betterment assessment on account of the construction of the sewer. It is not alleged that the total amount levied exceeded the cost of the sewer. The rate of assessment was per front foot. The petitioner's predecessor in



title, Joseph A. Harwood, was the owner when the orders cited were passed and when the assessment was levied of a long strip of vacant land, chiefly adapted for residential purposes. Its frontage on the avenue was fourteen hundred and thirty-one and sixty-one one-hundredths feet and this was its main frontage. The levy included an assessment upon Joseph A. Harwood in respect of this land of \$2,090.89 on the nine hundred and eighty-three and sixty one-hundredths feet on the northeast corner of Lauriat Avenue and of \$952.36 on the four hundred and forty-eight and one one-hundredths feet on the southeast corner of Lauriat Avenue. When the petitioner acquired his title to the land does not appear. The petition was filed on July 15, 1904. The return, the allegations of fact in which it is agreed are to be taken as true, states that the construction of the sewer was of great and special benefit and advantage to the respective estates assessed, including the estate of the petitioner, and in excess of the amount of the assessments and that the petitioner has acquiesced in the assessments by using the sewer, and by making payment without protest of the annual apportionment of the assessments for five years.

1. The petitioner alleged some grounds for asking that the assessment be quashed which are not argued upon his brief, and which we treat as waived. These were that the city was estopped from making such an assessment by the provisions of a deed given to the city by Joseph A. Harwood on May 24, 1893, of so much of the land then owned by him as lay within the lines of the avenue, and that the method of doing the work of construction was not according to law.

2. The petitioner now contends that the assessment was wholly void for want of legislative authority, St. 1891, c. 323, St. 1892, c. 402, and St. 1897, c. 426, having been declared unconstitutional, citing *Weed v. Mayor & Aldermen of Boston*, 172 Mass. 28; *Sears v. Street Commissioners*, 173 Mass. 350, and *Lorden v. Coffey*, 178 Mass. 489.

In the first place it is to be noted that there is no ground for contending that the assessments upon Joseph A. Harwood in the present instance offended against any constitutional provision whatever. The assessment was for not more than the cost of the public work. It was only in respect of the special benefit and



advantage caused to the respective estates assessed, by the construction of the public work. It was in every instance for an amount less than the special benefit so caused. As the sewer was in a street, the assessment by the front foot was a proportionate assessment.

The constitutionality of St. 1891, c. 323, was considered in *Weed v. Mayor & Aldermen of Boston*, 172 Mass. 28, but all that there was decided was that where a sewer had been laid not in a street but in a strip of private land taken for the purpose the method of laying the assessments prescribed by the statute is unreasonable and disproportionate and that the statute in this respect is unconstitutional. But St. 1891, c. 323, § 15, was amended by St. 1892, c. 418, § 8, and in *Lorden v. Coffey*, 178 Mass. 489, was declared unconstitutional because under it the whole assessment might be greater than the whole benefit to the property assessed. It was also held in *White v. Gove*, 183 Mass. 333, that St. 1892, c. 402, providing for sewer assessments in Boston was void for unconstitutionality irrespective of its application to particular cases. St. 1897, c. 426, was so held in *Sears v. Street Commissioners*, 173 Mass. 350.

It is hard to be certain under what statute the superintendent of streets deemed he was acting in levying the assessment of August 18, 1898. But as the work was done under an order of the commissioners which purported to rest upon the provisions of St. 1891, c. 323, and its amendments, we infer that the tax was supposed to be laid under St. 1891, c. 323, § 15, as amended by St. 1892, c. 418, § 8, and that the reason why the assessment was for the cost of the sewer only, and not for the whole cost of constructing the street, was that all the abutters had made a similar arrangement with that indicated by Joseph A. Harwood's deed of May 24, 1893, and that the city authorities construed that arrangement to leave the city at liberty to assess a betterment tax for the cost of the sewer but not for the cost of relocating, establishing the grade of and constructing the street. However this may be we assume in favor of the petitioner that the legislative authority, which when the assessment was made was supposed to sustain it, is now shown by the decisions cited not to have existed.

The writ for which the petitioner asks is not a writ of right



and is issued only when it is shown that substantial justice requires it.

From the stipulation in the deed of May 24, 1893, and the fact that the city authorities saw fit to assess only the cost of construction of the sewer it seems probable that there was some special agreement between the petitioner's predecessor in title and the city, under which the then owner of the land was content with the assessment and did not wish to contest its validity. At any rate the petitioner himself has paid without protest five of the ten payments into which the tax has been apportioned, and has made use of the sewer. This use was in effect an assertion on his part that he had a right to use it because of the existence of the assessment. Just what practical advantage is to be gained by quashing the assessment it is difficult to see. Although he did not wait quite six years he did wait so long that it is probable that the quashing of the assessment at the present time might occasion legal complications. As there was no legal objection to the tax on general principles except that the statute under which it was laid was void because unfair and illegal assessments might be laid under it, there is no reason of substantial justice for us to quash the assessment. We think therefore that the decision of the justice who heard the case should stand.

*Order dismissing the petition to stand.*

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· JOHN WHITE vs. HORACE J. UNWIN.

Essex. March 23, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Negligence, Employer's liability.*

It is no evidence of negligence on the part of a superintendent that, after having ordered two carpenters working under him to move a staging constructed by the workmen a little way to make room for a window frame, he went away without stopping to see how the staging was moved and did not inspect it afterwards to see whether it had been made as strong as before, and if a journeyman carpenter is injured by a fall of the staging due to the negligence of his two fellow workmen in the manner of moving it or in not strengthening it after it was moved, he cannot hold his employer liable for his injuries.



TORT, under R. L. c. 106, § 71, cl. 2, by a journeyman carpenter against his employer, a contractor and builder, for personal injuries alleged to have been caused by the negligence of the defendant's superintendent. Writ dated April 1, 1902.

In the Superior Court the case was tried before *Gaskill, J.*, who ruled that there was not sufficient evidence to warrant the submission of the case to the jury, and ordered a verdict for the defendant. He reported the case for determination by this court. If the ruling was correct, judgment was to be entered on the verdict; if it was erroneous, judgment was to be entered for the plaintiff in the sum of \$1,200 by agreement of the parties.

*J. P. Sweeney*, for the plaintiff.

*J. G. Walsh*, for the defendant.

KNOWLTON, C. J. The plaintiff, a journeyman carpenter, was working for the defendant upon a staging on the outside of a building, and was injured by the fall of the staging. The staging was like those ordinarily constructed by carpenters as a part of their regular business, for use in places where they are needed, and it is not contended that an employer, who furnishes his employees with proper materials and leaves them to construct such a staging, is liable to any one of them for the negligence of a fellow workman in doing the work. *Colton v. Richards*, 123 Mass. 484. *Killea v. Faxon*, 125 Mass. 485. *Kennedy v. Spring*, 160 Mass. 203. *O'Connor v. Rich*, 164 Mass. 560. *Adasken v. Gilbert*, 165 Mass. 448.

There was evidence tending to show that on the day before the accident the staging was moved a very short distance, by blows from a hammer of such force as to loosen the nails by which one of its supports was attached to the building. The evidence on this part of the case came from a single witness who was one of two persons directed by the superintendent to put in a window frame. According to his testimony, it became necessary to move the staging a little to make room for the window frame, and he testified that the superintendent told them to move it for that purpose. There was no evidence that the superintendent saw what was done to move it, or how it was left. The evidence tended to show that after giving this direction he went away and did not return until it was time to leave off work for



the day. There was no evidence that there was anything in the appearance of the staging, after it was moved, to indicate that it was not left as safe as before, or that the superintendent had any knowledge that it was unsafe at any time before the accident. The defect described was seemingly one that would not ordinarily be discovered without a close inspection.

The principal contention of the plaintiff is that the jury might have found the superintendent negligent in not discovering and repairing the defect before the accident. This presents the question whether it was his duty to inspect the work of the two men who made the change, before permitting the staging again to be used. As we already have seen, it has frequently been decided that an employer or his superintendent owes his employees no such duty when he directs the construction of a new staging by workmen whom he supplies with proper materials for the work. These two men, who were told to move the staging, knew that its use as a staging was to be continued. Its situation and the condition of the work made that plain. They knew that men might be expected to go to work upon it at any time. They knew, therefore, that in changing it, they ought to leave it in a safe condition. If they loosened some of the nails by striking upon the support and moving it a fraction of an inch, more nails driven into the support in its new place would have made it strong. There was evidence of negligence on the part of these men in moving the staging without leaving it well supported, and the question is whether it was the duty of the superintendent to inspect their work after it was done, to see whether they had done it properly, or whether he might assume that they exercised due care in moving the staging, as he might have assumed that the other workmen used due care in constructing it. We are of opinion that there was no such difference between the relations of these two carpenters to the safety of the staging as they were expected to leave it, and the relations of those who built it to its safety originally, as to call for the application of different rules to the different conditions. The superintendent well might expect that these carpenters, in changing the position of a staging which was expected to be used at any time by themselves or their companions, would exercise the same care to have it safe that they would exercise if they were building a new one. He



properly might trust the work to them as well in one case as in the other. See *Burns v. Washburn*, 160 Mass. 457; *Carroll v. Willcutt*, 163 Mass. 221.

We are of opinion that there was no evidence of negligence on the part of the superintendent.

*Judgment on the verdict.*

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PIERRE N. BRUNELLE vs. LOWELL ELECTRIC LIGHT CORPORATION.

Middlesex. March 23, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Contract, Construction. Electric Light Company. Estoppel.*

In an action against a company furnishing electricity, for personal injuries from a shock of electricity received when taking hold of a portable cord to carry an electric lamp to a part of the cellar under the plaintiff's shop, it appeared, that a contract in writing by which the defendant agreed to connect its electric system with the plaintiff's shop and to furnish electric current for a certain number of incandescent lamps of a certain power, contained the following provision: "It is agreed that all wires upon the premises of the customer to which the company's service will be connected, shall be so installed that the company may carry out this contract, and shall be kept in proper condition by the customer: that the customer will give, or obtain all necessary permission, to enable the agents of the company to carry out this contract and to enter the premises at all reasonable times, so long as any of the company's property remains therein, for the purpose of keeping in repair or removing its property or inspecting its own or the customer's wires or apparatus." *Held*, that under this contract the defendant did not owe to the plaintiff the duty of inspecting the wires, and that the clause giving the defendant the right to inspect the premises of the plaintiff was inserted for the protection of the defendant and not for that of the plaintiff.

To leave to a jury the question, whether under a certain contract in writing the customer of a company furnishing him with electric light had a right to assume that the company under the contract undertook the inspection of the plaintiff's premises, is error, the construction of the contract being a question of law for the court.

*Semble*, that one who has installed electric light wires in his premises without the permission in writing of the inspector of wires as required by a municipal ordinance, if injured by a shock of electricity from one of the wires thus illegally installed, may be precluded from maintaining an action for his injuries against the company furnishing the power if his violation of law contributed to the accident, unless the company's knowledge of this violation estops it from setting up this defence.



**TORT by the proprietor of an apothecary shop on East Merrimack Street in Lowell against a corporation maintaining an electric light plant in Lowell and furnishing electricity for light, heat and power, for personal injuries from a shock of electricity received when taking hold of a portable cord to carry an electric lamp to a part of the cellar under the plaintiff's shop. Writ dated December 7, 1903.**

At the trial in the Superior Court before *Wait, J.* it appeared that the portable cord was installed in the cellar in the manner described in the opinion. On October 12, 1903, the plaintiff went into his cellar, and took hold of the portable cord in order to carry the lamp to a distant part of the cellar, when he received a severe shock, was thrown to the ground, and became unconscious, in which condition he remained for some fifteen minutes. His right hand was badly burned. It was admitted that the wiring in the cellar was not established under a written permission of the inspector of wires as required by an ordinance of Lowell, which is referred to in the opinion.

**The contract mentioned in the opinion was as follows:**

**"The Lowell Electric Light Corporation.**

### “Application for Electric Service.

**"Lowell, Mass.,** **190**

**"By P. N. Brunelle to the Lowell Electric Light Corporation  
(hereinafter called Electric Company):**

"Subject to the printed terms and conditions recited on the back of this application, you will please connect your Electric System to premises No. East Merrimack Street, and furnish Electric Current for the following: 8 16 c. p. Incandescent Lights which I agree to use during the term of one year begin-

ning, and pay therefore on or before { Monday }  
 { the 10th day }

of each  $\left\{ \begin{array}{l} \text{week} \\ \text{month} \end{array} \right\}$  next succeeding that for which service is charged at the following rates: eleven (11) cents per Kilo Watt hour net, as may be shown by the statement of the meter. And if not paid on or before the 10th day of each month 10 per cent. additional charge to be made.

"In case the meter reading shows a consumption amounting to less than twelve dollars per year, I further agree to pay the sum of twelve dollars per year net.



"I hereby authorize and allow the Electric Company to set up in convenient and suitable places on the above named premises, the necessary transformers, meters and appliances, and it is further agreed that no change or alteration shall be made in the number of horse power of the motors, the number or candle power of the lamps, or the wiring of the above named premises, without first obtaining the written consent of the Electric Company.

"As a guarantee for the faithful performance of this contract hereby deposit \$ \_\_\_\_\_, to be returned only after this contract has finally terminated and \_\_\_\_\_ have fully complied with all of its terms.

"It is mutually agreed that the terms and conditions printed hereon, in so far as they are not inconsistent herewith, are a part of this agreement.

"This application to become a contract binding upon the company when accepted in writing by the proper officer of the Electric Company, and no agreement or representation made by any representative of the company shall be binding upon the company unless incorporated in this application.

"P. N. Brunelle.

"Accepted this 15 day of May, 1903.

"The Lowell Electric Light Corporation,

"By N. T. Wilcox, Manager.

"Terms and Conditions.

"All lamps, meters, wires, and other appliances furnished by the company shall remain the property of the company. It is agreed that all wires upon the premises of the customer to which the company's service will be connected, shall be so installed that the company may carry out this contract, and shall be kept in proper condition by the customer: that the customer will give, or obtain all necessary permission, to enable the agents of the company to carry out this contract and to enter the premises at all reasonable times, so long as any of the company's property remains therein, for the purpose of keeping in repair or removing its property or inspecting its own or the customer's wires or apparatus, and the customer will not permit access for removal of property, to parties other than its employees or the authorized representatives of the company, or persons duly authorized by law."



The defendant asked for various rulings, which were refused by the judge.

The fourteenth ruling requested, which was refused and which the court holds should have been given as an instruction to the jury, was as follows :

“There is nothing in the terms of the written contract between the plaintiff and the defendant in reference to lighting the store of the plaintiff which imposed upon the defendant any duty of inspection or examination of the wires, portable cord and appliances in the cellar of the plaintiff and belonging to the plaintiff, although they were attached to the wiring system of the same store belonging to the plaintiff at the time that said contract was made.”

The jury returned a verdict for the plaintiff in the sum of \$4,995; and the defendant alleged exceptions.

*W. H. Bent*, for the defendant.

*J. J. Hogan*, for the plaintiff.

HAMMOND, J. In 1893 the plaintiff began the use of electricity for lighting his store upon the ground floor, and such use was continued until January 13, 1903, when it was stopped until May 13, 1903, when it was renewed under the contract of that date. In May, 1902, the plaintiff made an extension of his wiring into the cellar of his store. A wire was attached to the inside wiring belonging to the plaintiff, near a door leading into the cellar, and was extended, in the form of a flexible cord about fifteen feet long, into the cellar. At the end of the cord was a lamp consisting of a socket and bulb. When not in use the cord was kept suspended over a hook. There was no fuse in any part of this extension, nor between it and the other wiring inside the plaintiff's store. There was a switch near the top of the cellar stairs, which could be turned so as to light the lamp, and in using the lamp it was customary to turn on the light by means of this switch, take the flexible cord down from the hook and carry the lamp wherever needed in the cellar within the limit of the length of the cord. In making this extension the plaintiff did not ask leave of or notify the defendant. The inside wiring of the store, excepting fuses, was installed by the plaintiff, and all the wires, lamps and other paraphernalia inside the store excepting the fuses, fuse-box and meter were his.



It was in dispute whether the defendant knew of the cellar lamp.

Under these circumstances, the contract of May 13, 1903, was made. By its terms the defendant was to connect its electric system to the plaintiff's store and furnish electric current for eight incandescent lamps, each of sixteen candle power, and was authorized by the plaintiff to set up in convenient and suitable places on the premises the necessary transformers, meters and appliances; and it was further agreed that "no change or alteration" should "be made in the number of horse power of the motors, the number or candle power of the lamps, or the wiring of the . . . premises, without first obtaining the written consent of the" defendant. All lamps, meters, wires, and other appliances furnished by the company were to remain its property. It was further agreed "that all wires upon the premises of the customer to which the company's service will be connected, shall be so installed that the company may carry out this contract, and shall be kept in proper condition by the customer." Then follows the provision that "the customer will give, or obtain all necessary permission, to enable the agents of the company to carry out this contract and to enter the premises at all reasonable times, so long as any of the company's property remains therein, for the purpose of keeping in repair or removing its property or inspecting its own or the customer's wires or apparatus."

We are of opinion that under this contract the defendant did not owe to the plaintiff the duty of inspecting the wires and apparatus belonging to him. The duty of keeping such wires and apparatus in proper condition rested upon him by the express language of the contract, and by necessary implication there was imposed upon him the obligation to use due care in its performance. It is plain that such care would involve proper inspection. The right reserved to the defendant to inspect the property of the plaintiff was not inserted for his protection but for that of the defendant. The provision gave to the defendant a right to be exercised in its own interest, and did not impose upon it a duty to be performed in the interest of the plaintiff. The fourteenth ruling requested by the defendant should therefore have been given. The question of the construction of the



contract was for the court, and that portion of the charge which submitted to the jury the question whether the plaintiff had a right to assume that the defendant undertook under the contract the inspection of the premises, and which described the degree of care which would be required under that assumption was erroneous in law, and was prejudicial to the defendant upon a material point in its case.

In view of the conclusion to which we have come upon this branch of the case, it becomes unnecessary to consider at length the questions arising upon the other grounds of defence, inasmuch as it cannot now be foreseen what shape they may take at another trial. It may be stated however that the extension made in May, 1902, was in plain violation of the ordinance, since it was made without the written permission of the inspector of wires. § 9. The plaintiff thereby violated the ordinance within the meaning of § 14, which provides a penalty to be inflicted upon "whoever violates" any of its provisions. The case is clearly distinguishable from the class of cases of which *Perry v. Bangs*, 161 Mass. 35, upon which the plaintiff relies, is a type. It is further to be observed that while the violation of law by a defendant, although evidence of his negligence, is not conclusive even when the illegal act contributes to the injury, (*Hanlon v. South Boston Horse Railroad*, 129 Mass. 310, and cases there cited,) yet such violation on the part of the plaintiff, which contributes directly and proximately to the injury received by him, is in general a bar to his recovery. "He is precluded from recovering, on the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim." Knowlton, J. in *Newcomb v. Boston Protective Department*, 146 Mass. 596, 602. See also cases cited in that case. Whether the plaintiff's violation of law contributed to the accident, and whether there is or could be anything in the knowledge of the defendant which would estop it from setting up that defence, it is not profitable now to consider.

*Exceptions sustained.*



## THOMAS J. MOYLON vs. D. S. McDONALD COMPANY.

Suffolk. March 23, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, &amp; BRALEY, JJ.

*Negligence, Employer's liability. Elevator.*

In an action by a boy employed to operate a freight elevator, against his employer, for injuries from being thrown to the floor of the elevator by its giving a violent jerk, in consequence of which his foot slipped over the edge of the car and was caught, if there is evidence that the car ran irregularly because of the defective condition of the guides, and that if a proper investigation had been made the imperfection would have been discovered, it may be found that the defendant failed to provide suitable instrumentalities for the plaintiff's employment or to keep them in reasonably safe repair.

A boy fourteen years of age employed to operate a freight elevator assumes the risk of only obvious dangers, and if there is evidence that the guides of the elevator were defective but that the guides and the manner of their construction were not visible except on an inspection, that the boy had noticed that the elevator did not seem to be in good running order and had so reported to the superintendent, that there always seemed to be something the matter with the elevator, although the boy did not know the cause, and that once it had shaken when he was using it, it is a question of fact for the jury whether the boy assumed the risk of an accident caused by the elevator throwing him to its floor by a violent jerk, and also is a question of fact whether he was in the exercise of due care.

BRALEY, J. This is an action of tort at common law to recover damages for personal injuries suffered by the plaintiff, a boy fourteen years of age, while in the defendant's employment. In the Superior Court, upon all the evidence, a verdict in the defendant's favor having been ordered and returned, the case is before us on the plaintiff's exceptions to the ruling.

In the performance of his work the plaintiff was directed by the defendant's superintendent to use a freight elevator that ran between the different floors of the defendant's building. While using it his foot became jammed between the side of the car and the top of the jamb of a door that opened from the elevator well into the dining room.

It is the defendant's first contention that there was no substantial evidence of its negligence for the consideration of the jury. See *Clark v. Jenkins*, 162 Mass. 397, 398.

At the time of the accident according to the plaintiff's testi-



mony he was operating the elevator in the usual way when in passing between the second and third floors there was a violent jerk, the force of which caused him to fall to the floor, while his foot slipped over the edge of the car and was caught.

On a further description given on cross-examination he said that before being thrown there was a very loud noise that apparently came from underneath the car, followed by its lurching and shaking, and that "when it began to shake there was a kind of pressure to it."

This description of the accident and of the working of the car was followed by the evidence of a mechanical expert called by the plaintiff, who testified in substance that if the elevator and its operating machinery were in proper repair it should not have jerked, or that if it swayed with the violence described this was indicative of a defective mechanical condition in the lateral rails or guides on which it ran. An examination of the car, and the guides, which were substantially the same after as before the accident, had been made by him, and he found a play of three quarters of an inch, that in his opinion allowed an improper amount of lateral motion. He also ascertained that the guides were loose, and that where they were attached to the walls there were variations in the joints of the short pieces of iron of which they were made.

According to his opinion the looseness of the guides caused an excess of lateral motion which combined with the unevenness of the joints allowed the car to catch if the safety shoes or clutches used for the purpose of gripping the rails in stopping were not exactly even. Whether they were even and in proper working order was an issue of fact on all the evidence.

If these clutches caught on the uneven joints when the car was running, they would hold for a longer or shorter time according to the amount of friction, and upon being released by the rising of the moving car it would jump with more or less violence, and render it unsafe.

Notwithstanding that the evidence of the defendant's witnesses very strongly tended to prove that beyond the ordinary wear from its use, which was not enough to produce the condition claimed, the elevator was safe and ran evenly, the jury were not required to accept this version, but were at liberty to



take the plaintiff's statement of what occurred, as well as his description of its condition. *Aiken v. Holyoke Street Railway*, 180 Mass. 8, 12. If they did, then his evidence, taken in connection with that of his expert, furnished some proof that the car ran irregularly because of the defective condition of the guides. They further could find that if a proper investigation had been made by the defendant the imperfection would have been discovered. *Dronney v. Doherty*, 186 Mass. 205.

An inference of the defendant's neglect would follow in failing to provide suitable instrumentalities, or to keep them in reasonably safe repair.

But it is further urged that even if such negligence could be established the plaintiff should be held, either to have assumed the risk, or to have been careless.

Under his contract of employment while he took the premises as he found them, this assumption covered only obvious dangers, whether of exposed and unguarded machinery, or a particular method of carrying on business, or arising from the ways, works or machinery being out of repair. *Anderson v. Clark*, 155 Mass. 368. *Garant v. Cashman*, 183 Mass. 13, 19. *Murphy v. Marston Coal Co.* 183 Mass. 385.

If he assumes the risk by his conduct still it must be shown that he knew of, and appreciated the danger, to which he voluntarily exposed himself. *Mahoney v. Dore*, 155 Mass. 513. *O'Maley v. South Boston Gas Light Co.* 158 Mass. 185, 186.

The guides, and the manner of their construction, were not visible except on an inspection that ordinarily would be made when the elevator was not running. It was an appliance provided for his use, and which he was directed to use by the superintendent, who represented the defendant. *Daley v. Boston & Albany Railroad*, 147 Mass. 101, 114.

It further appeared from the plaintiff's evidence, that previous to his injury he had noticed that the elevator "did not seem to be in good running order", and had so reported to the superintendent.

There was, however, no evidence that the plaintiff was acquainted with the manner in which the machinery of which the guides formed a part operated in starting or stopping the car. He had made no examination but simply knew that upon pull-



ing the operating cord it started, or stopped, at the will of the operator.

Besides, when injured he was following the usual and proper course of his employment. After observing and reporting to the superintendent that it was not running smoothly, there was no further obligation of inquiry into the cause resting upon him.

The length of time elapsing after this information had been given to those whose duty it was to see that it was sufficiently safe is not shown, but the plaintiff well might infer that it still could be properly used, for if unserviceable he would be so instructed.

To what extent from his former observation that there "always seemed to be something the matter with it", though he did not understand the cause, and that it had shaken once before when he was using it, but not so violently, should be held to have affected his conduct, or rendered it negligent, was for the jury to decide. It cannot be said as matter of law that he assumed the risk, or was guilty of negligence. *Donahue v. Drown*, 154 Mass. 21. *Powers v. Boston*, 154 Mass. 60, 68.

The remaining exceptions relate to the exclusion of certain questions put to one of the plaintiff's experts, but as there must be a new trial it is not necessary to consider them.

*Exceptions sustained.*

*J. J. Feely*, (*R. Clapp* with him,) for the plaintiff.

*C. S. Knowles*, for the defendant.

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BAY STATE GAS COMPANY OF DELAWARE vs. THOMAS  
W. LAWSON & others.

Suffolk. March 28, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Equity Jurisdiction.*

A bill in equity by a corporation against the members of a firm of brokers, alleging that the defendants acted as fiscal agents for the plaintiff for a series of years and rendered monthly accounts which were received by the plaintiff without



objection by reason of fraud, collusion and conspiracy on the part of the managing officer of the plaintiff who controlled its other officers in the acceptance of the accounts, and that the accounts were false and fraudulent in many particulars alleged, and praying that the accounts be opened, or that they be surcharged and falsified to rectify the frauds and errors therein, is good on demurrer as setting forth ground for equitable relief.

**BILL IN EQUITY**, filed as finally amended on January 10, 1904, by the Bay State Gas Company of Delaware, a corporation organized under the laws of the State of Delaware, against Thomas W. Lawson of Boston and Camille Weidenfeld of the city and State of New York, lately copartners under the firm name of Lawson, Weidenfeld and Company, and Allen Arnold and Henry H. Arnold, both of Boston, the said Lawson and the two last named defendants doing business under the firm name of Lawson, Arnold and Company.

The bill alleged that the defendants Lawson and Weidenfeld were continuously, from August 27, 1895, to July 1, 1900, copartners, doing business as brokers, that during the period from August 27, 1895, to December 7, 1896, one Otis Kimball was associated in business with them as a copartner, but on the date last named retired from the firm under an arrangement between him and the defendants which provided for the assumption by the defendants Lawson and Weidenfeld of all the then existing partnership liabilities. The allegations and prayers of the bill are sufficiently described in the opinion. The defendant Lawson demurred to the bill as finally amended, and also moved to strike out certain portions of the bill.

The case was heard by *Brale*y, J., who made an order that the demurrer be overruled, and denied the motion. At the request of the defendant Lawson he reported the case for determination by the full court.

*J. R. Dunbar* & *H. M. Davis*, (*H. Albers* with them,) for the defendant Lawson.

*S. L. Whipple*, (*A. Lincoln* with him,) for the plaintiff.

**KNOWLTON**, C. J. To this bill in equity the defendant Lawson has demurred generally and on special grounds. It is averred in the bill that the firm of Lawson, Weidenfeld and Company, of which the defendants Lawson and Weidenfeld were members, acted as brokers and fiscal agents for the plaintiff for a series of years, and in that relation received and disposed of a great deal



of property belonging to the plaintiff, for which they were accountable. It is also stated that they rendered monthly accounts to the plaintiff, which purported to be statements of the true financial relations of the parties in reference to the business transacted between them. Upon the averments of the bill, these monthly accounts, covering a long period, received by the plaintiff without objection, while the general relations of the parties remained unchanged, became accounts stated, which, *prima facie*, were binding upon them. It is alleged in the bill that these accounts were made falsely and fraudulently in many particulars, and among the prayers for relief is one that the accounts be opened, or that they be surcharged and falsified, on account of the frauds and errors which appear in them. These are the substantive statements, which are made in detail, to which the other averments are ancillary. In this particular the case appeals to a well known branch of jurisdiction in equity, especially in connection with the averments that these defendants were in a fiduciary relation to the plaintiff, and that the accounts were mutual, and of such a nature that they cannot be conveniently and properly adjusted and settled in an action at law. *Brownell v. Brownell*, 2 Bro. Ch. 62. *Clarke v. Tipping*, 9 Beav. 284. *Alfrey v. Alfrey*, 1 Macn. & G. 87. *Williamson v. Barbour*, 9 Ch. D. 529. *Greene v. Harris*, 11 R. I. 5. *Weed v. Smull*, 7 Paige, 573. *Floyd v. Priester*, 8 Rich. Eq. 248. *Pauling v. Creagh*, 54 Ala. 646. Story Eq. Jur. §§ 523, 526. 1 Dan. Ch. Pl. & Pr. (6th Am. ed.) 668.

The charges of fraud and error are sufficient, both in form and substance, to entitle the plaintiff to present its case in evidence.

The allegations of fraud, collusion and conspiracy on the part of the managing officer of the corporation who controlled the other officers are important, as explaining the long delay of the plaintiff in seeking a remedy from the defendants. Except for some such explanation, the plaintiff would appear to be bound by the acts of its officers in accepting these accounts and treating them as true, and would be barred by laches in neglecting to bring its suit earlier. But if this part of the case is proved, the statute of limitations will not be a bar and no laches will appear. *Wells v. Child*, 12 Allen, 838, 835. *Gould v. Emerson*, 160 Mass. 438, 440.



The failure to join Kimball as a party defendant is not fatal to the case. The averments as to the arrangement between him and the defendants Lawson and Weidenfeld and the subsequent dealings between these defendants and the plaintiff leave them liable to the plaintiff, without joining Kimball, for all matters for which they assumed to account to the plaintiff as members of the firm who continued the business after Kimball retired, and for all frauds and errors which entered into the accounts rendered after his retirement. *Wild v. Dean*, 3 Allen, 579. By these accounts, rendered in accordance with the arrangement with Kimball and received and accepted by the plaintiff, they entered into a relation with the plaintiff in reference to the matters accounted for, which entitles it to treat them as the only parties liable for the dealings which the accounts purport to include.

It has not been contended that these two joint defendants are not liable for everything done since the dissolution of the partnership in the regular liquidation of the business of the firm.

That part of the bill which relates to the interest of the defendant Lawson in the business of the firm of Lawson, Arnold and Company is included rightly, for the purpose of obtaining an equitable attachment under the R. L. c. 159, § 3, cl. 7.

The bill is not multifarious. It purports to present but one general ground of relief, which includes many details, namely, a right to the correction of errors in the accounts.

The reference to the receiver was immaterial and should be stricken out. In all other particulars the defendants' motion to strike out is denied.

*Demurrer overruled; motion to strike out denied, except in the part that refers to a receiver.*



**GEORGE L. KERR vs. ARTHUR B. ATWOOD.**

Middlesex. March 28, 1905. — June 28, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Tax, Arrest for non-payment. Officer. False Imprisonment.*

For the purpose of making an arrest under R. L. c. 18, § 26, for non-payment of a tax, the collector has made reasonable search for goods on which to levy when he has requested the delinquent to exhibit goods upon which the levy may be made and the delinquent has refused or neglected to exhibit them.

In an action against a constable for alleged unlawful arrest under a tax warrant, if it does not appear that the defendant made a specific demand upon the plaintiff to exhibit goods upon which to levy before making the arrest, the return of the defendant upon the warrant that he made diligent search for and was unable to find goods of the plaintiff, although not conclusive, is *prima facie* evidence in favor of the defendant.

In an action against a constable for alleged unlawful arrest under a tax warrant, if there is evidence that the plaintiff was arrested for non-payment of a tax after the defendant had made reasonable search for goods on which to levy, the questions whether on the facts shown there was unnecessary or improper delay in proceeding to the jail with the plaintiff or whether the plaintiff was subjected to improper treatment are for the jury.

TORT against a constable for alleged unlawful arrest and false imprisonment of the plaintiff under a tax warrant on January 14, 1903. Writ dated January 15, 1903.

At the trial in the Superior Court before *Wait, J.* the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

*J. J. Walsh & T. P. Riley*, for the plaintiff.

*H. L. Boutwell & W. H. Hastings*, for the defendant.

HAMMOND, J. In this action to recover damages for an alleged assault and false imprisonment, the defendant pleaded justification under a tax warrant.

R. L. c. 18, § 26, under which the arrest was made, is as follows: "If a person refuses or neglects to pay his tax for fourteen days after demand and the collector cannot find sufficient goods upon which it may be levied, he may take the body of such person and commit him to jail until he pays the tax and charges of commitment and imprisonment, or is discharged according to law." The main question is whether



there was evidence from which the jury might find that the defendant could not find sufficient goods within the meaning of the term as used in this statute.

The jury were instructed in substance that it was the duty of the defendant to make a diligent search, but that if before the arrest the defendant demanded of the plaintiff that he exhibit goods for the purpose of being taken on the warrant and the plaintiff, having goods which he could have exhibited, failed to exhibit them, then as matter of law the defendant had made diligent search and could lawfully arrest. We are of opinion that this instruction was correct.

After the adoption of our State Constitution, the first statute authorizing arrest for non-payment of taxes was St. 1785, c. 70, § 2. It reads as follows: "And if any person assessed as aforesaid to the state or other tax, shall refuse or neglect to pay the sum or sums so assessed, by the space of twelve days after demand thereof, and shall neglect to show the constable or collector sufficient goods or chattels whereby the same may be levied, in every such case, he may take the body of the person so refusing, and him commit unto the common gaol," etc. This provision appears in Rev. Sts. c. 8, § 11, in this language: "If any person shall refuse or neglect, for fourteen days after demand thereof made, to pay his tax, and the collector cannot find sufficient goods, upon which it may be levied, he may take the body of such person and commit him to prison," etc. And through the various codifications the language has remained substantially the same. Gen. Sts. c. 12, § 13. Pub. Sts. c. 12, § 14. St. 1888, c. 390, § 18. R. L. c. 13, § 26. There is nothing in the report of the commissioners on the Revised Statutes to show that they intended to make any change in the statute, so far at least as respects the effect of a refusal of the delinquent taxpayer, when requested, to exhibit goods upon which levy may be made; and we think no change was made. So far as respects the right to arrest, the collector has made reasonable search when he has requested the delinquent to exhibit goods upon which levy may be made; and if the delinquent refuses or neglects to make such an exhibit the collector may properly return that he cannot find sufficient goods. It is the duty of the delinquent to pay his tax and, in default thereof, after a



certain time to exhibit to the collector upon demand goods upon which levy may be made. The law does not impose upon the collector the idle task of seeking elsewhere when with warrant in hand he has asked the delinquent to show goods upon which to levy, and the latter who should know fails to indicate where there may be such goods. The instructions of the presiding judge were in accordance with this view and were correct and pertinent to the case. The evidence amply warranted the finding that the plaintiff had refused upon demand to exhibit to the defendant goods upon which to levy.

The question whether the defendant had made reasonable search even if he had made no specific demand upon the plaintiff to exhibit goods properly was left to the jury. In the first place the return upon the warrant that he had "made diligent search for and was unable to find goods and chattels of the within named George L. Kerr whereof to make distress," although not conclusive evidence in this action, was nevertheless *prima facie* evidence in favor of the defendant. *Lothrop v. Ide*, 13 Gray, 93. *Barnard v. Graves*, 13 Met. 85. The jury well may have thought that in view of the duty of the plaintiff to do what he could, his general suspicious attitude on the question, his oft repeated statement of his inability to pay even the small sum due, and the existence of the mortgage, the defendant was not obliged in law to inquire about the household furniture in the dwelling house of the plaintiff, into which against his will the defendant could not enter for the purpose of levying, nor, in view of the character of the mortgage, to undertake to get from either of the parties to the mortgage any information as to whether it was valid as to the whole or any part of the articles in the store. The jury well may have thought that the *prima facie* case made out by the return stood notwithstanding the other evidence. In *Hall v. Hall*, 3 Allen, 5, cited by the plaintiff, it did not appear from the return upon the warrant that the defendant made any search whatever. The case upon this branch of it was submitted to the jury upon proper instructions, and the jury were warranted in finding that the defendant had made diligent search and could not find sufficient goods upon which to levy, and therefore had authority to make the arrest. For cases bearing somewhat upon the questions here discussed, see in addition to



those above cited, *Parker v. Abbott*, 130 Mass. 25; *Bayley, petitioner*, 132 Mass. 457; *Flint v. Whitney*, 28 Vt. 680.

The questions whether there was unnecessary or improper delay in proceeding to the jail at East Cambridge, or whether the plaintiff was subjected to improper treatment were also for the jury, and we see no error in the instructions on that point. The jury properly might find that the delay was at the request of the plaintiff, or that in any event it was not unreasonable, and that neither in being placed in the cell of the police station nor in any other respect was he treated improperly. We see no error in the manner in which the court dealt with the requests of the plaintiff on this point.

The evidence as to whether the plaintiff ever had told the defendant that he had in his house a piano or other property, or ever offered or pointed out to the defendant any specific articles in his store, or whether he was the George L. Kerr who gave the mortgage and that he never told the defendant about the mortgage, was admitted properly, and so was the copy of the mortgage. The evidence had a bearing upon the question of reasonable search.

The questions put to the plaintiff as to his ability to pay the tax if he had not paid other bills did not exceed the latitude fairly allowed in cross-examination, and we do not see how the plaintiff could have been prejudiced by it.

We regard the statement by the judge in the charge that taxes should be paid before private debts as simply introductory to what followed, and in any event it could work no harm to the plaintiff.

The evidence that there was no other place of detention in Malden except the police station was admissible upon the question whether the plaintiff was properly treated, and it was admitted rightly.

*Exceptions overruled.*



**JOSEPH K. HAYES, JR., trustee, vs. GEORGE S. HALL & others.**

**Suffolk. March 29, 1905. — June 23, 1905.**

**Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.**

*Superior Court. Equity Jurisdiction. Trust, Duties and liabilities of trustee.*

The Superior Court under its general equity jurisdiction has authority to receive and pass upon the accounts of trustees and to make all proper orders and decrees concerning them.

If a trust fund includes a second mortgage on land of one of the trustees, and this trustee at a foreclosure of the underlying first mortgage procures a person to attend the sale and purchase the land for the wife of this trustee for \$150,000 when it is worth at least \$200,000 and a co-trustee brings a suit in equity electing to affirm the foreclosure and seeking to charge the trustee first mentioned with the difference between the purchase price and the value of the mortgaged property, it is a question of fact which properly may be determined by a master, whether the defendant trustee was acting solely at the request of his wife and merely as her messenger, she paying for the land out of her separate estate, or whether he was acting as his wife's agent for his own or her benefit to the detriment of the trust estate. In the last case he would be chargeable with the amount of the loss to the trust.

If one of several trustees of a trust created by deed does an act which makes him accountable to the beneficiaries for a loss suffered by the trust, and the act is done without the knowledge or consent of his co-trustees, his co-trustees are not chargeable with the loss if there was no fault or negligence on their part.

**BILL IN EQUITY**, filed in the Superior Court on February 19, 1902, by Joseph K. Hayes, Jr., one of three trustees under an indenture of trust between George S. Hall and the three trustees dated February 9, 1900, against his co-trustees and the beneficiaries of the trust, praying that the accounts of the several trustees should be passed upon, and that the plaintiff should be allowed to resign, amended by leave of court on November 10, 1902, by withdrawing the plaintiff's resignation as trustee and the prayer for its acceptance.

The case was referred to Edward F. McClennen, Esquire, as special master. On December 10, 1903, he filed a report to which the defendant George F. Hall filed two exceptions as follows: 1. The defendant objects to the ruling of law that George F. Hall, on the facts stated in the report, should be charged with \$50,000 or any other sum. 2. That if George F. Hall should be charged for any sum, that such sum, based upon the find-



ings of facts and rulings of law, should be for a less sum than \$50,000.

The case came on to be heard, upon the pleadings, the master's report and the exceptions thereto, before *Gaskill*, J., who reserved it for determination by this court, such orders and decrees to be made as equity might require.

*J. K. Hayes, Jr., pro se*, filed a brief.

*G. V. Phipps*, for the defendant George F. Hall.

*F. D. Allen*, for the defendants Henry A. and Marian E. Hall.

**BRALEY, J.** The rule that a trustee in the management of property held by him in trust shall not be permitted directly or indirectly to derive any personal advantage from its use or sale, but must act solely for the interests of those beneficially interested, has often been referred to, and approved by this court. *Jennison v. Hapgood*, 7 Pick. 1. *Ball v. Carew*, 13 Pick. 28. *Hayward v. Ellis*, 18 Pick. 272. *Litchfield v. Cudworth*, 15 Pick. 23, 31. *Shelton v. Homer*, 5 Met. 462, 467. *Parker v. Nickerson*, 112 Mass. 195. *Dyer v. Shurtleff*, 112 Mass. 165, 168. *Brown v. Cowell*, 116 Mass. 461, 465. *Bowen v. Richardson*, 133 Mass. 293, 296. *Morse v. Hill*, 136 Mass. 60. *Parker v. Nickerson*, 137 Mass. 487. See also *Davoue v. Fanning*, 2 Johns. Ch. 252, 256, 257; *Fox v. Mackreth*, 2 Bro. Ch. 400; *White & Tudor's Lead. Cas. in Eq.* (4th Am. ed.) 115, note 148; *Michoud v. Girod*, 4 How. 503.

The foundation of this rule has been said to be the presumption that the trustee in dealing with the trust estate, where by its purchase his pecuniary interest is concerned, will not be disinterested. If permitted to expose himself to this temptation ordinarily he would consider his own advantage, and not that of those who are dependent upon his integrity and sound judgment for the wise and proper administration of the trust property. *Aberdeen Railway v. Blakie*, 1 Macq. 461, 478, 479.

But where trust property is sold under a decree, the court determines and directs the manner of its sale, and permission to bid is sometimes given to the trustee, but only after notice, upon hearing all parties interested, and when it appears that such a course will be advantageous to the trust. *Colgate v. Colgate*, 8 C. E. Green, 372, 383.

With this exception sales either to himself, or to others upon



a secret arrangement for his benefit, or by him after he thus gets title, to purchasers with notice, or to his wife or relations for a less price than he could have obtained from other buyers, are voidable at the election of the *cestuis que trust*. *Oberlin College v. Fowler*, 10 Allen, 545.

They may resort to a court of equity either to compel a reconveyance upon payment of the purchase price, or to require the property to be resold, or upon their affirmation of the sale if the trustee has sold it in excess of the price paid by him he must account for the proceeds, or if unsold they may charge him in his accounts with its actual value at the time of sale. *Morse v. Hill*, *ubi supra*. *Rotch v. Morgan*, 105 Mass. 426, 480.

In the present case George S. Hall by the declaration of trust is shown to have founded it for his own benefit as beneficiary for life, with remainder for life to his sons, their wives, and to his grandchildren, who also were to take the principal. The board of trustees consisted of himself, his son George F. Hall, and Joseph K. Hayes, Jr., who was the only person outside of the family connected with its administration. They had not given bonds, nor were they required to render any account of their trusteeship, neither was there any provision in the instrument for the filling of vacancies caused by death or resignation. Apparently the management of the estate had not been entirely satisfactory to Hayes, for upon filing his account, in which all the trustees must be deemed to have joined, he asked permission to resign, though subsequently this request was withdrawn. See *Dodd v. Winship*, 133 Mass. 359, 361.

The Superior Court, under its general equity jurisdiction, had authority to receive and pass upon their accounts as rendered, and to make all proper orders and decrees. R. L. c. 147, § 5. *Bowditch v. Banuelos*, 1 Gray, 220. *Bradstreet v. Butterfield*, 129 Mass. 339.

Thereupon that court directed that the accounts be referred to a master for examination, whose report and the exceptions of George F. Hall thereto raise the questions presented for our decision.

Among the assets of the trust which the settlor delivered to the trustees was a promissory note for \$74,279.85, made by George F. Hall, and secured by a mortgage of his real estate on



which there was outstanding a first mortgage to the Massachusetts Loan and Trust Company for \$158,279.85. A default having been made in the performance of the conditions of the first mortgage, the mortgagee foreclosed, and as the purchaser at the foreclosure sale failed to pay the purchase money, the property was again advertised for sale. The trustees are found to have believed that the estate was worth at this time a sum in excess of \$200,000, which also was its value as determined by the master. But they did not consider it advisable to bid at the sale, or buy the property for the benefit of the trust, and their action has been approved by the master as judicious.

After this decision had been reached, George F. Hall, without the knowledge of Hayes, who appears to have been the only one of the remaining trustees competent at the time to act, procured one Vialle to attend the sale and purchase the property, to whom it was conveyed for the amount of his bid subject to accrued taxes, making the entire consideration \$150,000.

In procuring the attendance of Vialle, who subsequently conveyed the property thus bought to Mary S. Hall, the wife of George F. Hall, the latter contends that he acted solely at her request, and that the purchase in reality was made for her with money she borrowed for this purpose. The performance of this service, and nothing more, simply made him a messenger, and might be found consistent with his duty. But if as her agent, and husband, his purpose was to procure the property either for her or his own benefit at the lowest possible price, then his conduct would be antagonistic to the performance of the duties of his trusteeship, which required him to realize the highest obtainable price.

It is urged that the intimate character of the marital relation is such as generally to exclude the conception that the husband would act disinterestedly, and without regard to the financial interests of his wife. But we now are not called upon to decide whether under all circumstances a purchase by and conveyance to her of property held in trust by her husband would be held voidable when paid for out of her separate estate, even where the trustee himself was not authorized to buy. See *Dundas's appeal*, 64 Penn. St. 325; *Tyler v. Sanborn*, 123 Ill. 136.

The trustee seriously contends that as the sale was made by a



stranger, and not by himself, it is not within the inhibition already discussed. But this position cannot be sustained.

In the practical application of this rule it makes no difference that the purchase was made under a foreclosure sale at public auction held by a first mortgagee, of property on which at the time there was a valid outstanding second mortgage held by the trustees, and forming a very considerable part of the assets of the trust estate. *Marshall v. Carson*, 11 Stew. 250, 255.

The wrong would be none the less grievous, or the loss less appreciable if through his co-operation a junior incumbrance which otherwise would be valuable is made worthless, when accomplished indirectly under a sale by a mortgagee, than where it is brought about directly by a sale on the part of the trustee himself. *Morse v. Hill*, *Dyer v. Shurtleff* and *Marshall v. Carson*, *ubi supra*.

Any assent that may have been given by the other beneficiaries to the course pursued was not binding upon Henry F. Hall, or his wife Marian E. Hall, who contend that by reason of his conduct George F. Hall must be held accountable as trustee for the difference between the purchase price and the value of the mortgaged property.

They apparently do not wish to redeem, or to demand a resale of the equity of redemption, but electing to affirm the foreclosure, claim that he should be charged in the settlement of the accounts with this difference. *Morse v. Hill*, *ubi supra*.

Under the master's finding that his associate trustees did not join with him, but were ignorant of the course pursued, if it was determined to be wrongful they would not be chargeable at common law with the loss incurred. *Ames v. Armstrong*, 106 Mass. 15. *Abbott v. Fisher*, 124 Mass. 414, 417. *Brice v. Stokes*, 11 Ves. 314.

We cannot, however, properly assume in favor of the contestants as the master leaves the case, that Hall should be deemed guilty of unfaithful administration, and therefore accountable for the depletion of the trust estate.

To correctly determine the true character of his participation in the transaction there should be a full inquiry as to all the circumstances attending the purchase of the property at the second foreclosure. When this has been done, and the facts have been



found and reported, but not before, it properly can be decided whether he was delinquent, and hence chargeable with any loss to the estate caused by his delinquency, or whether his conduct being compatible with his duty entitles him to complete exoneration.

By the terms of the reservation under which the case is before us the first exception to the master's report must be sustained.

*Decree accordingly.*

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OTTO F. VON ARNIM & another, trustees, vs. AMERICAN  
TUBE WORKS & others.

Suffolk. March 31, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & BRALEY, JJ.

*Equity Jurisdiction. Corporation. Equity Pleading and Practice. Survival.*

In a suit in equity by a minority stockholder in a corporation to restrain the officers of the corporation who also are its directors and the holders of a majority of its stock from wrongfully taking the funds of the company, under the guise of commissions or participation in profits, largely in excess of the value of their services, it is not necessary to allege or prove that the plaintiff before filing his bill made an application to the wrongdoers for relief within the corporation.

The right of a corporation to recover from one of its officers property of the corporation wrongfully converted by him, or its value, survives against his estate.

Where the officers of a corporation wrongfully have converted property of the corporation to their own use, the death of one of them, which would work a severance of the joint liability at law, does not prevent the executor or administrator of the deceased officer being joined as a defendant in a suit in equity against the officers to compel restitution of the property to the corporation, since in equity appropriate separate decrees may be made.

BILL IN EQUITY, filed as amended and substituted by leave of court on December 8, 1904, by the trustees under the will of Elizabeth Cotton von Arnim against the American Tube Works, a Massachusetts corporation, and Walter G. Cotton, William C. Cotton, Frank B. Cotton, and the executors under the will of George H. Cotton, alleging among other things that the plaintiffs' testatrix was the aunt of the three Cottons above named, and was the holder of two hundred and twenty-five shares of the defendant corporation, that Walter G. Cotton was the president,



William C. Cotton the treasurer and Frank B. Cotton the assistant treasurer of the defendant corporation, the last named succeeding his brother George H. Cotton who was assistant treasurer for many years until his death about a year before the filing of the bill, that these Cottons also were directors of the defendant corporation and owned or controlled a majority of its stock, that in the latter part of the year 1903 reports were brought to the attention of the plaintiffs that for several years the Cottons, as officers of the defendant corporation, had been taking funds of the company, under the guise of commission or participation in profits, largely in excess of the value of their services, and without legal right, and that this course of action had been purposely concealed from the stockholders of the corporation other than the officers implicated, praying that an injunction might issue to restrain the defendants from drawing out more money in this manner except a salary of \$2,500 per annum each, for the treasurer and the assistant treasurer, that an account might be taken, and that the several other defendants might be ordered to repay to the defendant corporation the amounts wrongfully withdrawn, or that a receiver might be appointed authorized to bring such suits as might be necessary, and for other relief.

The defendants severally demurred to the bill as amended. The case was heard by *Hammond, J.*, who entered an interlocutory decree overruling the demurrers, and being of the opinion that such decree so affected the merits of the controversy that the matter ought before further proceedings to be determined by the full court, reported the case for such determination.

*S. L. Whipple & W. R. Sears*, (*E. M. Brooks* with them,) for the plaintiffs.

*C. T. Gallagher & W. B. Grant*, for the defendants.

BRALEY, J. All the material allegations of the amended bill that are well pleaded must be taken as admitted by the several demurrers. The defendants in support of their demurrers, with one exception which will be noticed later, rely upon the same grounds of defence, raising the general question whether a case is stated that entitles the complainant to equitable relief.

Under a bill of complaint brought by a minority stockholder against the officers of the corporation for official misconduct by which its assets have been wrongly appropriated, it is obligatory



for him to allege and prove, that they have failed to perform their duty, thus causing a breach of their trust; that upon notice and reasonable request the corporation has refused to take action, or that it is so under the control of the wrongdoers that any application for relief would be an idle ceremony; and that the complainant himself has been diligent in seeking and prosecuting his remedy. *Hawes v. Oakland*, 104 U. S. 450.

In the present case the wrongful conduct of the individual defendants, who are respectively president, treasurer, assistant treasurer, and directors of the company, is averred to have been the unlawful taking by them of its funds in excess of their several salaries, or of the value of their services. See *Putnam v. Gunning*, 162 Mass. 552.

It is also alleged that the treasurer and the assistant treasurer each was receiving a regular salary as compensation for his services, though there is no similar allegation concerning the employment of the president, and that their misappropriation of corporate property which continued for a number of years was purposely concealed from all stockholders other than those implicated.

Upon the face of the bill no reference is made to any by-law of the corporation, or vote of the stockholders, or of the directors sanctioning such use of the company's assets. However valuable the services of these officers may have been in advancing its business interests they rightly could not take these funds for their services under the fiction that such an appropriation was in payment of salary or commissions on profits, unless in some proper form their action was authorized by the corporation. *Sawyer v. Pawnors' Bank*, 6 Allen, 207, 209. *Pew v. First National Bank of Gloucester*, 130 Mass. 391. *In re Newman*, [1895] 1 Ch. 674.

The defendants' argument that these payments to themselves have been sanctioned and ratified by the long continuance of the custom itself ought not to prevail.

Neither the plaintiffs as trustees, nor the testatrix, who appears to have been an original stockholder, are shown to have been cognizant at any time of the course being pursued, and they cannot be held to have ratified by their silence official misconduct of which they had no knowledge. *Metropolitan*



*Coal Co. v. Boutell Transportation & Towing Co.* 185 Mass. 891, 897.

Even if a majority of the stockholders consented to ratify an illegal use of its funds, their assent would not bind a protesting minority, or prevent them from obtaining appropriate equitable relief. *Eaton v. Robinson*, 19 R. I. 146. *Brown v. De Young*, 167 Ill. 549. *Blair v. Telegram Newspaper Co.* 172 Mass. 201.

But if the plaintiffs have sufficiently alleged a breach of their trust by the defendant officers, it is insisted by all the defendants that the bill must be dismissed for want of a previous application to the corporation itself for redress.

When the company originally was organized it apparently was designed to be, and has continued, a close corporation, whose stock almost exclusively has been owned by the family composed of the defendants, their deceased brother, and their aunt, the testatrix, under whose will the plaintiffs are trustees. These defendants who, as directors, are stated to have combined with themselves when acting as president, treasurer, and assistant treasurer for the purpose of effecting the alleged wrong, are also represented as owning a large majority of the capital stock, and consequently have full control of the company's affairs.

To require an application to be made to the wrongdoers for relief within the corporation as a condition precedent to maintaining this bill would be futile, for they could prevent any remedial action being taken.

When, therefore, it appears that such an application must in the nature of things be unavailing the law does not require it to be made. *Brewer v. Boston Theatre*, 104 Mass. 878. *Dunphy v. Traveller Newspaper Assoc.* 146 Mass. 495. *Blair v. Telegram Newspaper Co.* 172 Mass. 201. *Dimpfell v. Ohio & Mississippi Railway*, 110 U. S. 209.

It is well settled that equity aids the diligent and refuses relief to those who slumber upon their rights; and that the defence of long and unexplainable delay, when accompanied by a full knowledge of the facts, or of information which should put a party upon his inquiry, if shown by the bill, may be raised by demurrer. *Sawyer v. Cook*, ante, 163.

But where, as in this case, it is alleged that a minority stockholder, while relying on the business management of her nephews,



has been by them deliberately kept in ignorance of the true state of affairs, followed by a refusal upon request of the trustees of her estate for access to the books of the corporation, and such access and the method of corporate administration shown by them was obtained only after a bill in equity for relief has been brought, it cannot reasonably be said that there has been a want of diligence in her lifetime, or since her death an unreasonable delay after the facts were known, sufficient to bar this suit. *Dunphy v. Traveller Newspaper Assoc.* 146 Mass. 495. *Doane v. Preston*, 183 Mass. 569. *Loring v. Palmer*, 118 U. S. 321, 344.

The failure to join as parties those referred to under the allegation of "other persons acting in concert and participating with them" affords no ground for dismissing the complaint as the defendants are answerable for their own misconduct under the third prayer for relief for an accounting and repayment, while they are not responsible for the independent illegal acts of unnamed parties. *Todd v. Old Colony & Fall River Railroad*, 3 Allen, 18, 20. *Bay State Gas Co. v. Lawson*, *ante*, 502.

In addition to the general causes of demurrer already considered, the executors of the will of George H. Cotton, who as a former assistant treasurer is alleged to have participated in the unlawful diversion, also assigned as further reasons for the dismissal of the bill as to them, that the plaintiffs' cause of action did not survive against their testator, and that if it did they cannot be sued jointly with the other defendants.

The plaintiffs' cause of action is founded upon the right of the corporation itself to recover for the misappropriation of its property by the deceased. If any of the defendants are finally held liable to make restitution, generally reimbursement would be made not to the plaintiffs, but to the corporation which always is a necessary party to such suits, though where the exigencies of the case require it, and to avoid circuity of action, a stockholder may be granted individual relief in the same suit. *Pratt v. Bacon*, 10 Pick. 123, 126. *Dewing v. Perdicaries*, 96 U. S. 193, 198. *Eaton v. Robinson*, 19 R. I. 146. *Laurel Springs Land Co. v. Fougeray*, 5 Dick. 756. *Miner v. Belle Isle Ice Co.* 98 Mich. 97.

When recovery follows in such a suit it rests on the right either to recover the property, or its value, which it is claimed



has been wrongfully converted by the testator, and an action survives against his estate. *Warren v. Para Rubber Shoe Co.* 166 Mass. 97, 104. *Wineburgh v. United States Steam & Street Railway Advertising Co.* 173 Mass. 60. R. L. c. 171, § 1.

The remaining question is one of more difficulty. It is manifest that if ultimately the bill can be maintained the corporation could have brought an action for money had and received against each officer for the amount withdrawn by him, or if it was proved that the president, treasurer, and assistant treasurer, when acting as such, or as a board of directors, permitted its money to be illegally taken, by one or all, they as trustees could be jointly or severally compelled to make restitution. *Warren v. Para Rubber Shoe Co.*, *ubi supra*, at page 104 and cases cited.

If the acts of the testator, and of his brothers, the other individual defendants, were so related as to form a part of the general design of misappropriation no practical inconvenience would arise if he were living in determining his liability in this suit. Nor would the bill thereby be rendered multifarious. *Lenz v. Prescott*, 144 Mass. 505; *Dunphy v. Traveller Newspaper Assoc.*, *ubi supra*, at page 499. *Bliss v. Parks*, 175 Mass. 539, 543. *Graves v. Corbin*, 132 U. S. 571, 580.

His death worked no transformation of his original liability, and his estate continued liable to the corporation. *Wineburgh v. United States Steam & Street Railway Advertising Co.*, *ubi supra*.

At law by reason of his decease there would be a severance of any joint liability, and the plaintiffs could have maintained one action against the executors, and another against the survivors. *Cowley v. Patch*, 120 Mass. 137. The severance, however, affects only the remedy for reasons fully stated in *New Haven & Northampton Co. v. Hayden*, 119 Mass. 361. *Cowley v. Patch*, *ubi supra*.

This rule of procedure, however, does not affect the proceedings before judgment but goes upon the ground that a joint judgment is indivisible, and must include all the defendants. *Munroe v. Cartisle*, 176 Mass. 199, 201. See *Stone v. Dickinson*, 5 Allen, 29.

In proceedings in a court of equity, with but one trial of the merits of the case, the remedy administered can be adapted to,



and made commensurate with any relief to which, under the pleadings, the plaintiffs are equitably entitled. And this technical common law difficulty is avoided by separate decrees in which, if it becomes necessary, the liability of the testator's estate, or of the executors personally, for costs can be adjusted in the same manner as if they had been sued in a separate action. *Lenz v. Prescott, ubi supra. Jones v. Davenport*, 18 Stew. 77.

*Decree overruling demurrer affirmed.*

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ANDREW C. WHEELWRIGHT & others vs. CITY OF BOSTON  
& another.

Suffolk. March 31, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, & BRALEY, JJ.

*Constitutional Law. Boston. Northern Avenue.*

St. 1903, c. 381, authorizing the laying out and construction of Northern Avenue in Boston is not unconstitutional as impairing the obligation of the contract in regard to building an extension of Eastern Avenue in Boston made under authority of St. 1868, c. 326.

St. 1903, c. 381, authorizing the laying out and construction of Northern Avenue in Boston is not unconstitutional as imposing upon that city an expenditure of public money for a private use.

In St. 1903, c. 381, authorizing the laying out and construction of Northern Avenue in Boston, although the provision at the end of § 2, that no compensation, with a certain exception, shall be paid for lands or flats of the Commonwealth or of the city of Boston or of the Boston Wharf Company or of certain railroads within Northern Avenue or Sleeper Street, is unconstitutional and void, it relates to a separate and independent subject and its unconstitutionality does not affect the validity of the rest of the statute.

KNOWLTON, C. J. This is a petition brought by ten taxpayers of the city of Boston to enjoin the city from proceeding to construct Northern Avenue and a bridge across Fort Point Channel, under the provisions of the St. 1903, c. 381, reserved for our consideration by a single justice of this court. It is contended that the statute is unconstitutional, first, as impairing the obligation of a contract made on June 24, 1873, between the Commonwealth, the city of Boston, the Boston and Albany Railroad Company and the Boston Wharf Company, and secondly,



as imposing upon the city an expenditure of public money for a private use.

We will first consider the contention that the statute impairs the obligation of this contract. The contract was entered into under the authority of St. 1868, c. 826, and it contains elaborate provisions for the filling of flats, the improvement of property, and the construction of streets over land in South Boston, then flowed at high tide. If we assume that the contract was legal and binding in all its parts, the question is, whether there is anything in it that deprived the Commonwealth of the right to make such an enactment in regard to the construction of streets in 1903, as it might have made if no such contract had been executed. We are concerned only with the stipulation of the writing in regard to the construction of bridges and streets. This is a covenant by the city to build an extension of Eastern Avenue, and a bridge across Fort Point Channel, within eighteen months of the date of the writing. But the city was not obliged to do this at a greater cost than the estimate of the city engineer, dated June 15, 1872. The city covenanted that, if it failed to build the bridges and extend the avenues according to the agreement, the Commonwealth might do it, and that the city would pay to the Commonwealth all reasonable expenses which the Commonwealth should incur, not exceeding said estimate of the city engineer. It is agreed that the Commonwealth repeatedly asked the city to do this work. It also is agreed that the cost of doing it would have exceeded the estimate of the city engineer referred to, and therefore the city was not obliged to do it. The Commonwealth never has exercised its option to construct the streets and bridges and be reimbursed by the city for a part of the expense not exceeding the amount of this estimate.

The effect of these covenants, as applied to the facts, was to give the city a right to go on and construct streets and bridges within a reasonable time, although they cost more than the amount of the estimate. But the city was under no obligation to do it. On the city's failure to act, the Commonwealth had an option to go on and build, and be reimbursed in part; but it was not bound to do it. In view of the necessary cost of the work, the contract left no one under any obligation to perform it. Either the city or the Commonwealth might exercise its



option within a reasonable time, but if neither chose to do it, no street could be constructed under the contract. Nearly thirty years having elapsed without action by either party in this direction, these ineffectual provisions of the contract, under which nobody had any rights then enforceable, were no bar to proper action by the authorities in the laying out and construction of streets, such as might have been taken if there had been no contract. There was no statement or suggestion in the writing that these options, if not exercised, should bar other proper measures for the establishment of such streets as might be needed by the public. When the St. 1903, c. 381, was passed, the Legislature had the same right to provide for the construction of streets and bridges in this place that it would have had, under the conditions then existing, if no contract ever had been made.

It is conceded by the petitioners that the Legislature may require the construction of streets and bridges as well by a special act as by general legislation. *Agawam v. Hampden*, 130 Mass. 528. *Browne v. Turner*, 176 Mass. 9. Their objection to the statute is, that it appears to be enacted solely in the interest of property owners in the neighborhood, and not for the benefit of the public. We think this view of the statute is erroneous. Using the language of the R. L. c. 48, § 1, the Legislature well might find that "common convenience and necessity" required the construction of the street and bridge. It often happens that the interests of property owners in the vicinity are greatly promoted by the laying out of a highway. This fact lies at the foundation of our laws authorizing special taxation in such cases. In determining whether a way should be laid out under the general laws, every holder of real estate should be considered as one of the public, and that part of the public who reside or own property in the neighborhood of the proposed improvement are more directly interested, and therefore more to be considered, than people at a greater distance. When the Commonwealth is a large property owner, the interest of this owner as one of the public is not that of only one person, but is that of the whole public. In determining whether common convenience and necessity require the construction of this work, the Legislature well might consider, among other things, its effect upon the interest of property owners in the vicinity, including in that class all the



people of the Commonwealth, because of their interest in the Commonwealth's flats.

But the validity of the statute does not rest solely or chiefly on this ground. The facts would warrant a finding by the Legislature that this street, which in the petitioner's brief is called a cul-de-sac, was needed to make another connection with the great highways of commerce leading to every part of the habitable globe. It seems probable that, with this avenue open to the public, the cargoes of great ships will soon be carried over it for the benefit of all the people. In our view, this statute, in its leading features, is not different in principle from any special act which requires a municipality to build, for the general public, any other important bridge or highway. It therefore becomes unnecessary to consider the numerous cases which relate to the expenditure of public money for a private use.

In one particular the act goes beyond the constitutional authority of the Legislature. In connection with the provision for compensation for lands taken is this language: "But no compensation for any lands or flats within said avenue or street of the Commonwealth, or of said city, or of the Boston Wharf Company, or of said railroads, except land of said railroads taken for Sleeper Street where the same is fifty feet wide, shall be allowed or paid." This evidently is an incorporation of a part of the contract of June 24, 1873, into this statute. That part of the contract relates only to the proposed construction of the bridge and streets by the city, under the terms of the contract. Inasmuch as that part of the contract was not acted upon, the agreement in regard to the land has not become applicable to any property taken. The agreement does not extend to anything done outside of the contract. In afterwards enacting this independent statute, the Legislature was bound to provide for the compensation of those whose land is taken. Very likely there will be no actual damage to land taken under this statute; but if there is such damage, it must be paid for under the preceding general provision.

We are of opinion that this unconstitutional language does not render the whole act void, for it relates to a separate and independent subject, seemingly not of great importance, such that the Legislature presumably would have enacted the statute



without hesitation if this provision had not been contained in it. *Edwards v. Bruorton*, 184 Mass. 529, and cases there cited.

*Petition dismissed.*

*C. A. Williams*, for the petitioners.

*T. M. Babson*, for the respondents.

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GEORGE J. DONAHER & others vs. JAMES H. FLINT,  
Judge of Probate.

Norfolk. April 3, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.

*Bond. Guardian.*

It is no ground for reversing on error a judgment for the plaintiff in an action on a guardian's bond, brought in the name of a judge of probate, that at the time the judgment was entered the ward for whose benefit the action was brought was dead, and no executor or administrator of his estate has been appointed.

HAMMOND, J. This is a writ of error brought to reverse a judgment rendered against the plaintiffs in error in an action upon a guardian's bond brought in the name of the judge of probate of Norfolk County under R. L. c. 149, § 29. The alleged error is one of fact, namely, that at the time the judgment was rendered the ward, for whose benefit the action was brought, was dead and no executor or administrator of her estate ever was appointed; and the judgment therefore was void.

R. L. c. 149, § 29, provides that "Bonds given by guardians . . . may be put in suit by order of the Probate Court for the benefit of any person interested in the estate, and the proceedings in such actions shall be conducted in like manner as is provided relative to actions on bonds given by executors or administrators." The method of bringing actions upon the bonds of executors and administrators is prescribed by §§ 20-23. By an examination of these sections it is seen that there are two classes of actions upon such bonds, one where the person interested can bring the action without the permission of the judge of probate, and one where such permission must first be obtained.



The only persons who can bring an action without the permission of the judge are (1) a creditor who has recovered judgment against the executor or administrator and he has neglected on demand to pay or to show sufficient goods or estate to be taken upon execution (§ 20); (2) a creditor of an estate which has been represented insolvent, if the amount due him has been ascertained by a decree of distribution and the executor or administrator upon demand neglects to pay (§ 21); and (3), a person who is next of kin. He may bring an action to recover his share of the personal property after a decree of the Probate Court ascertaining the amount due him if the executor or administrator neglects upon demand to pay the amount (§ 22).

The second class of actions is defined in § 23, which provides that "if the Probate Court, upon the representation of any person interested in an estate, finds that the executor or administrator has failed in any manner not specified in the three preceding sections to perform the conditions of his bond, it may authorize any creditor, next of kin, legatee or other person aggrieved by such maladministration to bring an action on the bond." The distinction between these two classes was judicially noticed very early, (see *Glover v. Heath*, 8 Mass. 252,) and is recognized throughout R. L. c. 149. See §§ 26, 31, 32, 33.

It is provided in § 31, that in cases of the first class the execution shall be awarded for the use of the creditor or next of kin as the case may be, and in § 32 that he "shall be considered as the judgment creditor, and may cause the execution to be levied in his name and for his benefit, as if the action had been brought and the judgment recovered in his name."

On the other hand, as to actions of the second class, it is provided in § 31 that when the action is brought for a breach of the condition in not accounting for the estate as required by law, "execution shall be awarded, without expressing that it is for the use of any person, for the full value of all the estate of the deceased which has come to the hands of the executor or administrator and for which he does not satisfactorily account," and in § 33, that in such a case all money received on such an execution "shall be paid to the co-executor or co-administrator, if any, or to the person who is then the rightful executor or administrator, and shall be assets in his hands to be administered according to law."



The original action was analogous to this second class of actions, and evidently such was the view of the Superior Court. *Choate v. Arrington*, 116 Mass. 552. The record shows that the jury found "for the plaintiff and assess damages in the sum of twelve hundred dollars," which was the penal sum named in the bond; and that upon the report of the assessor to whom the case had been referred to ascertain and report the sum for which execution should issue, and upon the agreement of the parties that judgment might be entered "for the plaintiff," for the sum found due by the assessor, the court, on September 6, 1894, "as per agreement of parties," entered up judgment, and it was "therefore considered by the court that the said James H. Flint, Judge of the Probate Court for the County of Norfolk recover against" the defendants the sum named by the assessor.

As was said by Wells, J. in *Choate v. Arrington*, 116 Mass. 552, 556, "the purpose of awarding the execution in this mode is to put the whole assets of the estate, not already disposed of and accounted for in a proper manner, into the control of the judge of the Probate Court, so that he may proceed with its settlement and direct the course of its further administration."

The Probate Court may at any time appoint a special administrator to receive from the officer the proceeds of the execution. The parties to the judgment being alive, it was not void because of the death of the ward. In *Glover v. Heath*, 3 Mass. 252, which was a writ of error to reverse a judgment rendered in an action brought in the name of the judge of probate upon the bond of an executor for not rendering his account, it was held that the judge of probate should have execution for the full amount of the personal estate although the error assigned was that two of the persons for whose use execution was awarded were dead at the time the judgment was rendered; and although the authority of this case has been shaken as to another point, (*Coffin v. Jones*, 5 Pick. 61; *Paine v. Stone*, 10 Pick. 75,) still, in the point under consideration it seems never to have been questioned. In principle it is decisive of the present case.

The plaintiffs in error have cited to us the cases of *Johnson v. State*, 2 Houst. 378, and *McLaughlin v. Neill*, 3 Ired. 294. These cases doubtless rest upon the statute law of the respective States. So far as they are inconsistent with the



result to which we have come in this case, we cannot follow them.

There is a technical error in the record. The judgment for the amount of the penalty in the bond should have been entered before reference to the assessor. If necessary, judgment now could be entered *nunc pro tunc*, *Choate v. Arrington, ubi supra*, but as no complaint is made of this irregularity, and as there is no necessity for changing the matter, the

*Judgment is affirmed.*

*J. J. Feely & R. Clapp*, for the plaintiffs in error.

*J. E. Hannigan*, for the defendant in error.



RICHARD H. LUFKIN & others vs. MARY A. JAKEMAN.  
ABBOTT W. LAWRENCE, administrator, vs. JOHN W. LUFKIN  
& others.

Suffolk. April 4, 1905. — June 23, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & BRALEY, JJ.

*Trust, Resulting. Gift. Limitations, Statute of.*

If a man buys and pays for a parcel of real estate and has it conveyed to a woman who is living with him as his housekeeper and whom he has agreed to marry as soon as his wife shall obtain a divorce from him, there is no presumption of a gift, and a resulting trust is created in favor of him who pays the purchase money, especially if the circumstances show that he does not intend to make a gift of the real estate to the person in whose name the title is taken.

In case of a resulting trust created by the payment of the purchase money for land the title of which is taken in the name of another person, the statute of limitations does not begin to run against the equitable owner until the holder of the title begins to hold adversely, and if nothing appears to the contrary the transaction itself implies a recognition of the rights of the equitable owner until repudiation.

If a man buys and pays for a parcel of real estate and causes the title to be taken in the name of another person a resulting trust is none the less created because the object of the purchaser in having the title put in the name of the other person is to defeat any possible claim of his wife to alimony, especially where the purchaser is not insolvent and his wife is not in fact defrauded, as the enforcement of the trust in no way depends on the fraudulent purpose and does not require its proof.

BILL IN EQUITY, filed in the Superior Court on May 11, 1904,  
and removed to and filed in the Supreme Judicial Court on July



26, 1904, by the children and only heirs at law of Richard Lufkin, late of Chelsea, against Mary Ann Jakeman, otherwise known as Mary Ann Lufkin, alleging herself to be the widow of Richard, to establish a resulting trust in certain real estate numbered 74 and 76 on Spencer Avenue in Chelsea.

ALSO AN APPEAL from a decree of the Probate Court for the county of Suffolk disallowing in the account of Abbott W. Lawrence, special administrator of the estate of Richard Lufkin, certain items relating to rents received from the real estate on Spencer Avenue mentioned above.

The suit in equity was referred to a master who found that Richard Lufkin bought the property in 1877 and caused the deed to be made to Mary Ann Jakeman, the defendant, that the defendant went to live with Richard Lufkin as his house-keeper in 1868, and soon after agreed to marry him when he was free from his former wife, that in 1890 there was a ceremony of marriage between them, and that in 1898 on the death of his former wife the defendant became his wife by virtue of St. 1895, c. 427, as amended by St. 1896, c. 499. See *Lufkin v. Lufkin*, 182 Mass. 476.

Both cases came on to be heard before *Hammond, J.*, who at the request of the parties reserved them for determination by the full court, such decree to be entered as law and justice might require.

*W. O. Underwood & H. F. Knight*, for the children of Richard Lufkin.

*H. R. Bailey & D. F. Kimball*, for Mary Ann [Jakeman] Lufkin.

KNOWLTON, C. J. The first of these cases presents the question whether the plaintiffs are entitled to certain real estate under a resulting trust, as the heirs of their father, Richard Lufkin, or whether it belongs to the defendant, the holder of the legal title. The property was bought by Richard Lufkin in 1877 and paid for with his money, but the title was taken in the name of the defendant. Lufkin occupied it, erected valuable buildings upon it, received all the rents and profits, and paid all taxes upon it until his death in 1901. His purchase and payment created a resulting trust in his favor against the defendant, who held the title as trustee for his benefit. *Mc-*



*Donough v. O'Neil*, 118 Mass. 92, 95. *Bailey v. Hemenway*, 147 Mass. 326, 328. *Cooley v. Cooley*, 172 Mass. 476, 477. *Ward v. Ward*, 59 Conn. 188. The rule that, when the person paying the consideration for real estate is under a natural or legal obligation to provide for the person who takes the title, there is a presumption of a gift and no presumption of a resulting trust, does not affect the present case. The plaintiffs' intestate was under no such obligation to the defendant. See *Cooley v. Cooley*, 172 Mass. 476, 477; *Jaquith v. Massachusetts Baptist Convention*, 172 Mass. 439, 445. He was engaged to be married to her whenever his wife should obtain a divorce from him and leave him free to marry again. It has been decided that a relation of this kind will not take a case out of the ordinary rule that creates a resulting trust in favor of him who pays the purchase money. *Soar v. Foster*, 4 Kay & Johns. 152. *Ward v. Ward*, 59 Conn. 188. *Rider v. Kidder*, 10 Ves. 360. *Todd v. Moorhouse*, L. R. 19 Eq. 69. *In re De Visme*, 2 DeG., J. & S. 17. *Beecher v. Major*, 2 Dr. & Sm. 431.

Moreover, where there is a presumption of a gift, it may be rebutted by parol evidence. *Dana v. Dana*, 154 Mass. 491. *Cooley v. Cooley*, 172 Mass. 476. *Ward v. Ward*, 59 Conn. 188. In this case the evidence tends to disprove any presumption of a gift, and the master has found that the purpose of the intestate was not to make a gift to the defendant.

The next question is whether the suit is barred by the statute of limitations. The findings show that Lufkin was in possession and that there was no adverse holding by the defendant previous to his death. The rule is well settled that, against the beneficiary under an express trust, the statute of limitations does not run so long as there is no adverse holding or repudiation of the trust. *Carpenter v. Cushman*, 105 Mass. 417. *St. Paul's Church v. Attorney General*, 164 Mass. 188, 200. *Currier v. Studley*, 159 Mass. 17, 20. *Baxter v. Moses*, 77 Maine, 465, 478, 481. *Kane v. Bloodgood*, 7 Johns. Ch. 90, 114. In *Currier v. Studley*, *ubi supra*, in speaking of a resulting trust, it was said that if the rights of the *cestui que trust* are recognized at the time of the conveyance, the statute of limitations begins to run in favor of the holder of the legal title against the equitable owner when the holder of the title begins to hold ad-



versely. The late decisions generally hold that, if nothing appears to the contrary, the transaction itself implies a recognition of the rights of the equitable owner, and in this respect, until repudiation, a resulting trust is like an express trust. *Soar v. Ashwell*, [1898] 2 Q. B. 390. *St. Paul's Church v. Attorney General*, 164 Mass. 188. Wood, Lim. (8d ed.) § 219, and note. Perry, Trusts, (5th ed.) § 865, note. See also *Potter v. Kimball*, 186 Mass. 120; *Jones v. McDermott*, 114 Mass. 400.

The facts already referred to are sufficient to enable the plaintiffs to enforce their equitable right, unless another fact, found by the master but not referred to in the pleadings on either side, leaves them without a right to relief. In the master's report is this sentence: "I find that said Richard caused the title to the land in controversy to be put in the name of the defendant to defeat any possible claim of his wife to alimony; that this was known to defendant; that there was no evidence that either his first wife or any other person was in fact defrauded or injured; that said Richard was not insolvent at the time, and ruled that the said purpose of said Richard would not defeat the right of his children and heirs at law to maintain this bill." It is contended that the resulting trust is so far a creature of Lufkin's fraud that a court of equity cannot enforce it.

The plaintiffs' case depends upon the averment that their father paid the entire consideration for the property included in the deed to the defendant, and that the purchase was his. Proof of these averments, without more, establishes their case. This is because a resulting trust arises from such facts by implication of law. His fraudulent purpose in reference to the claim of his wife for alimony does not appear in the statement or in the proof of the plaintiffs' case, unless the parties go outside of that which is necessary to establish *prima facie* a right to relief. If the fraudulent purpose is introduced, it is to change the rights which the law would otherwise give as the result of such a transaction. Now the fraudulent purpose referred to was only in reference to a person in the position of a creditor. The defendant does not represent the rights of this person. No attempt has ever been made by this person to obtain any interest in the property. The rights which she once had are entirely immaterial in this suit.



A conveyance fraudulent as against creditors is good as between the parties. Neither party, as against the other, can set up a fraud of this kind. *Clapp v. Tirrell*, 20 Pick. 247, 250. *Dyer v. Homer*, 22 Pick. 253. *Wall v. Provident Institution for Savings*, 8 Allen, 96. *Harvey v. Varney*, 98 Mass. 118. *Stillings v. Turner*, 153 Mass. 534. *Lawton v. Estes*, 167 Mass. 181. *Pierce v. Le Monier*, 172 Mass. 508, 512. Neither party can change the effect of the conveyance, as between themselves, by appealing to the purpose of either in reference to creditors. The plaintiffs do not attempt to change the effect of this conveyance. They stand upon it as it was made, with the implication of law that accompanies it. They did not seek to introduce the question of fraud, or to ask for any relief which is founded upon the fraud. The defendant attempts to set up the fraud against a creditor to deprive the plaintiffs of the rights which they have under the law. The rule is that neither party can obtain any aid from a court in the execution of a fraudulent scheme, or in the enforcement of an executory contract which rests directly and solely upon a fraud. In such cases the law leaves the parties where their fraudulent undertaking placed them. In the present case, if the resulting trust was directly the creature of the fraud, and rested upon that, independently and alone, a court of equity might decline to enforce it. But as between these parties, the present action is complete and perfect, without the introduction of any element of fraud. Their arrangement raises the question whether a common transaction, the legal effect of which as between themselves is plain, shall lose its character in any particular because one of the parties, in making the arrangement, acted, with the knowledge of the other, from a motive which was fraudulent as against a third person. The decisions in this Commonwealth, like those in several other States, hold that if a plaintiff can show a *prima facie* right to recover on the face of the contract, without developing the fraud in the transaction, the court will not permit the defendant to set up his own fraud, or fraud against a third person, as a defence. See 14 Am. & Eng. Encyc. of Law, (2d ed.) 277, and notes. See also the discussion by Mr. Justice Foster in *Harvey v. Varney*, 98 Mass. 118.

We are of opinion that the ordinary rights resulting from the



transaction between the parties were created in this case, and that the defendant cannot deprive the plaintiffs of the beneficial ownership which resulted to their father, on the ground that an inducement to the particular transaction was a purpose thereby to defraud a third person.

The second case is an appeal from a decree of the Probate Court, disallowing certain items in the account of the special administrator of the estate of Richard Lufkin. The special administrator was authorized, under the statute, to take charge of all the real estate of the deceased, and the items in question relate to rents received and expenses incurred in the management of the property which we have been considering. For the reasons given in the other case, the property belonged to the intestate, and it was the duty of the special administrator to take charge of it. In the first case there should be a decree for the plaintiffs, and in the second the decree of the Probate Court should be reversed, and the accounts should be allowed.

*So ordered.*



**SUMNER ROBINSON vs. WILLIAM O. WILEY & others.**

Suffolk. May 17, 1905. — June 23, 1905.

**Present: KNOWLTON, C. J., MORTON, LATHROP, HAMMOND, & BRALEY, JJ.**

*Assignment, For benefit of creditors.*

A right of action of a depositor against a bank, for wrongfully refusing to honor his checks when it had sufficient funds to his credit, is founded on a breach of contract and passes under a common law assignment made by the depositor for the benefit of his creditors.

**BILL OF INTERPLEADER**, filed in the Supreme Judicial Court on November 5, 1898, by the surviving partner of the law firm of Blaney and Robinson, who acted as counsel for the plaintiff in the case of *Wiley v. Bunker Hill National Bank*, reported in 183 Mass. 495, to determine whether the money recovered in that action should be paid to the defendant Wiley, the plaintiff in that action, or to the defendants Bullard and Wild, assignees under a common law assignment for the benefit of creditors



made by the defendant Wiley on February 21, 1898, the above named action having been begun on February 25, 1898.

The case came on to be heard before *Hammond, J.*, who reserved it for determination by the full court.

*W. H. Preble & S. H. Tyng*, for the defendant Wiley.

*C. W. Bartlett, E. R. Anderson & A. T. Smith*, for the defendants Bullard and Wild.

**BRADLEY, J.** The fund in the possession of the plaintiff is the avails of the judgment recovered in *Wiley v. Bunker Hill National Bank*, 183 Mass. 495. It belongs to the plaintiff in that action, who is a claimant here, unless under the assignment made by him for the benefit of his creditors his title passed to the assignees, who began and prosecuted the action. In the granting part of the instrument he conveys to them "all his . . . property and choses in action of every name, nature and description . . . except such property only as is exempt by law from attachment."

The language employed is comprehensive, and must be held to have conveyed all his title in any personal property, or rights of action he then owned, or possessed, and which were assignable.

Under the clause of exemption, which follows the form commonly used, the parties evidently intended to exclude from the conveyance the class of property that is exempt from seizure on an execution against the judgment debtor by the provisions of Pub. Sts. c. 171, § 34.

Up to the time of his failure the assignor had been engaged in buying and selling wood and coal, and kept an account with the Bunker Hill National Bank, upon which he drew checks in the ordinary course of his business. Having a sufficient balance for this purpose he drew a check in favor of third parties which upon presentation the bank wrongfully refused to honor. In consequence of this it was contended in the original suit that his credit had been impaired; that he had suffered pecuniary loss, and was thereby rendered insolvent.

The strongest contention of the defendant Wiley rests upon the ground that the injury to his credit thus caused was purely personal, and essentially slander. If this view is upheld, then the act of the bank was a pure tort, and his right of recovery



for the wrong was unassignable. *Rice v. Stone*, 1 Allen, 566, 569, 570. *Linton v. Hurley*, 104 Mass. 358. *Comegys v. Vasse*, 1 Pet. 193, 218.

Independently of the contract he had no cause of action. The refusal to pay his check was not a positive personal wrong distinct in itself for which alone a suit could have been maintained for injury to his feelings, but it was inseparable from the contract. *Drake v. Beckham*, 11 M. & W. 315, 319.

The ability of a trader to borrow money usually depends on the belief of the lender that the debt will be paid, and whatever tends to lower the financial standing of the borrower impairs his financial credit in the market. When checks given by him to his creditors are not paid upon presentation to his bankers, his financial standing, in the absence of satisfactory explanation, usually becomes impaired, and if not retrieved it may cause loss of customers, and finally ruin his business, with which may be associated a valuable right of good will. *Angier v. Webber*, 14 Allen, 211. *Moore v. Rawson*, 185 Mass. 264, 272, 273.

Such a result may be brought about in various ways. If accomplished by the circulation of false reports, it is slander or libel according to the form of defamation used, and the right of action dies with the person, but where it takes the form of a breach of contract then the remedy is under the contract for damages, not to his person, but to his business, which must be considered as property.

While it may be true that a merchant in good standing when subjected to the indignity of having his checks dishonored by a banker, with whom at the time there are sufficient unencumbered funds to pay them, suffers mental distress, the wrong inflicted is not to the person of the drawer, such as arises from defamation of character, or restraint of liberty, but springs from the banker's failure to perform his contract. *Wiley v. Bunker Hill National Bank*, *ubi supra*, at page 496, and cases cited. *Heath v. New Bedford Safe Deposit & Trust Co.* 184 Mass. 481.

It is sometimes said that the test of assignability depends upon the question whether the cause of action would survive the death of the assignor. *Stebbins v. Palmer*, 1 Pick. 71, 78, 79. *Comegys v. Vasse*, *ubi supra*. But if this is considered as affording the true standard by which to determine the quality of the



claim then the right to sue for the damages suffered would have survived to Wiley's personal representatives. *Stebbins v. Palmer, Wiley v. Bunker Hill National Bank, ubi supra.*

If instead of a voluntary assignment for the benefit of his creditors the debtor had taken advantage of our laws relating to insolvency his assignee indeed would not have been vested with any claim for damages for personal injuries suffered by the insolvent, because it is not a right of property until judgment has been obtained. *Stone v. Boston & Maine Railroad*, 7 Gray, 539. See *Billings v. Marsh*, 158 Mass. 311, 313. But a cause of action for breach of a contract made with the insolvent debtor, together with all incidental damages, would have passed. *Lothrop v. Reed*, 13 Allen, 294, 296.

In the instrument before us the terms employed to transfer title are fully as comprehensive as those used in Pub. Sta. c. 157, § 46. The object to be accomplished, which is the distribution of the debtor's property ratably for the benefit of his creditors, is the same in each case, and no sufficient reason appears why a different rule should be adopted whether the assignment is made by force of law, or where it is voluntary, if the language employed to transfer the debtor's right of property is susceptible of a similar construction.

It follows that the defendants, John C. Bullard and Benjamin F. Wild, as assignees, are entitled to the money now in the possession of the plaintiff.

*Decree accordingly.*

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WALTER M. BERRY vs. BOSTON ELEVATED RAILWAY  
COMPANY.

Suffolk. March 8, 1905. — June 26, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Master and Servant. Street Railway. Negligence.*

It is not within the scope of the employment of a conductor of a street railway company to call a policeman as a practical joke to arrest "two crooks" in an old car used as a place of shelter for conductors when off duty.



A street railway company is not liable to a person injured from stepping through a hole in a platform of an old discarded car used merely as a shelter for conductors when off duty.

TORT, by a police officer of the city of Boston, for personal injuries caused by stepping through a hole in the platform of a car of the defendant when called to arrest two supposed burglars. Writ dated August 3, 1901.

In the Superior Court the case was tried before *Mason, C. J.*, who at the close of the plaintiff's evidence ordered a verdict for the defendant. The plaintiff alleged exceptions.

The case was argued at the bar in March, 1905, before *Knowlton, C. J., Lathrop, Barker, Hammond, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices.

*J. F. McDonald*, for the plaintiff.

*F. Ranney & W. E. Monk*, for the defendant.

LATHROP, J. We are of opinion that the ruling that the plaintiff could not recover was right. The plaintiff was a policeman who at a quarter past three in the morning was called by a conductor of a car in the employ of the defendant. The conductor at the time he spoke was standing in the doorway of an old horse car, the only use of which was to afford a shelter for conductors while off duty. One end of the car and the windows were boarded up. The other end had still a platform, in which was a hole that had been there for some time. The policeman was in the street when called by the conductor, who said to the plaintiff, "Hey, come here, Berry, I have two crooks for you." The policeman came, and in stepping on the platform put one foot through the hole and sustained the injuries complained of. There were only two messenger boys of the Western Union Telegraph Company, in uniform, in the car at the time, who had received permission to wait there until a car started for Boston. The boys were well known to the conductor, and it was apparent from the evidence that the conductor was playing a practical joke on the policeman.

While the car was on the premises of the defendant, it seems to us clear that the act of the conductor was not within the scope of his employment, and that the defendant is not liable. The fact that the act was performed on the premises of the defendant was wholly immaterial. *Walton v. New York Central*



*Sleeping Car Co.* 139 Mass. 556. *Files v. Boston & Albany Railroad*, 149 Mass. 204. *Bowler v. O'Connell*, 162 Mass. 319. *Driscoll v. Scanlon*, 165 Mass. 348. *Brown v. Jarvis Engineering Co.* 166 Mass. 75, 77, and cases cited. *Brown v. Boston Ice Co.* 178 Mass. 108. *Crowley v. Fitchburg & Leominster Street Railway*, 185 Mass. 279.

It is further contended that this case falls within the principle of *Learoyd v. Godfrey*, 138 Mass. 315, namely, that a police officer is lawfully on the premises of another if he goes there to make an arrest. But the platform of an old discarded car, used merely as a shelter, differs from a wrought way, or a way of approach held out by the defendant as a way to which there is an implied invitation.

*Exceptions overruled.*

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ELIZABETH ALLWRIGHT vs. DAVID N. SKILLINGS  
& another, executors.

Norfolk. March 9, 1905. — June 27, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Practice, Civil*, Auditor's report. *Wagering Contracts*. *Witness*, Refreshing recollection. *Evidence*, Competency.

Unless the rule to an auditor provides that his findings on matters of fact are to be final, a motion to recommit an auditor's report is addressed to the discretion of the presiding judge, and his ruling is not subject to exception.

Under St. 1901, c. 459, there can be no recovery of money paid as margins where the person employed to buy or sell securities makes, in accordance with the terms of the contract or employment, actual purchases or sales of the securities.

A witness may be permitted to refresh his recollection from books of original entry although the books themselves would not be admissible in evidence.

In an action against the members of a firm of brokers, under St. 1890, c. 437, as amended by St. 1901, c. 459, for money alleged to have been paid on wagering contracts, the defendants may show the general nature of the business done by the firm, that orders always were executed by actual purchases or sales and that there never were any fictitious purchases or sales.

LATHROP, J. This is an action of contract under the St. of 1890, c. 437, as amended by the St. of 1901, c. 459, against the executors of the will of E. D. Bangs, to recover for moneys



and securities delivered to the firm of E. D. Bangs and Company during the years 1893, 1895, and 1896, as margin in certain stock transactions had by the plaintiff with the firm of which E. D. Bangs was a member. The writ is dated October 17, 1901.

In the Superior Court, the case was sent to an auditor who filed his report on April 5, 1904. At the trial in September, 1904, before a judge without a jury, the plaintiff moved to have the report recommitted to the auditor, on the ground that the auditor had admitted incompetent and irrelevant evidence, and that the findings of fact were based upon such evidence. The judge declined to recommit the report, and suggested that the parties go on and argue the case, and he would decide later whether to recommit the report, or to make rulings concerning the law and findings of fact.

The case was then heard upon the auditor's report alone, and fully argued. At the close, the counsel for the plaintiff said that he would like to save the same rights as he did before the auditor, and save the same exceptions.

Subsequently the judge filed the following memorandum: "After due consideration, I rule that the auditor did not commit any errors which require me, as matter of law, to recommit the report, and, as a matter of discretion, I decline to recommit it. And there being no evidence but the auditor's report, I find on that report for the defendant, and I rule that I have a right so to do. Whatever exceptions the plaintiff has under these facts and rulings are saved to her."

The judge subsequently allowed a bill of exceptions which set forth the nature of the case and the evidence so far as excepted to before the auditor. The record contains also the auditor's report and the pleadings.

We doubt whether there is any question of law properly before us. A motion to recommit an auditor's report is addressed to the discretion of the presiding judge, and his ruling is not subject to exception. *Kendall v. Weaver*, 1 Allen, 277. *Packard v. Reynolds*, 100 Mass. 153. *Butterworth v. Western Assur. Co.* 132 Mass. 489. An exception to this rule has been made where the rule to the auditor provides that his findings on matters of fact are to be final. *Tripp v. Macomber*, 187 Mass. 109.



In *Briggs v. Gilman*, 127 Mass. 530, it was said by Chief Justice Gray: "If one of the findings of the auditor appears to the court, upon the facts reported by him, to be erroneous in matter of law, or in excess of the authority conferred by the rule of reference, the jury may be instructed accordingly, and so much of his report stricken out, leaving the rest to have its proper weight and effect. . . . But an objection to a portion of the evidence upon which the auditor has based his conclusion cannot be taken, as matter of right, except by motion to recommit the report to the auditor before the trial." See also *Kendall v. May*, 10 Allen, 59, 66; *Fair v. Manhattan Ins. Co.* 112 Mass. 320, 331; *Briggs v. Gilman*, 127 Mass. 530; *Eagan v. Luby*, 133 Mass. 543; *Collins v. Wickwire*, 162 Mass. 143.

The plaintiff in the case at bar made no motion to recommit until the trial, nor did she ask for any ruling upon any portion of the report.

Assuming that the questions raised are properly before us, we see no error in the finding of the judge.

The St. of 1901, c. 459, upon which the plaintiff brings her action, has this qualifying clause: "But no person shall have any right of action under this act if for his account such other party to the contract or the person so employed makes, in accordance with the terms of the contract or employment, personally or by agent, an actual purchase or sale of said securities or commodities, or a valid contract therefor."

The auditor found as follows: "Upon the plaintiff's own testimony I further find that she intended that said firm should actually purchase for her account the securities ordered by her to be purchased, and should actually receive the same, and that they should actually, for her account, sell the securities ordered by her to be sold, and should actually deliver the same, and that the members of said firm had reasonable cause to believe that this was her intention."

The auditor further found "that said firm in accordance with the terms of the contract or employment in each instance actually purchased for her account and received the securities ordered by the plaintiff to be bought, and that . . . in each instance they actually sold for her account and delivered the securities ordered by her to be sold."



The plaintiff contends that these facts were found on incompetent evidence, relying upon the rule of law that books of account are not of themselves competent evidence, (see *Gould v. Hartley*, 187 Mass. 561,) and that the knowledge of the witnesses who testified was derived from the books alone. The books were not introduced in evidence, and we need not consider whether they might have been or not. The plaintiff contends that as the books could not be put in evidence, a witness could not refresh his recollection from the books; but we know of no principle of law to this effect. The rule is otherwise. See *Chapin v. Lapham*, 20 Pick. 467, 473; *Coffin v. Vincent*, 12 Cush. 98; *Commonwealth v. Ford*, 130 Mass. 64; *Commonwealth v. Kennedy*, 170 Mass. 18, 24. The witness who testified to the transactions in New York did not, as we understand his testimony, testify from hearsay, but from his personal knowledge. His answer is in part: "Refreshing my recollection from the original entry which I knew at the time to be correct," etc. So as to the witness called as to the Boston transactions. He was a member of the firm of E. D. Bangs and Company, and testified after refreshing his recollection from the books regularly kept by the firm, many of the entries referred to being in his own handwriting.

We see also no objection to the admission in evidence of the general nature of the business done by the firm of E. D. Bangs and Company, including evidence to the effect that in regular course what were known as Boston orders were executed by an actual purchase or sale of the securities on the floor of the Stock Exchange in Boston, and that what were known as New York orders were sent by telegraph to their agents in New York, to be executed by them, and that there never were any fictitious purchases or sales.

*Exceptions overruled.*

*V. J. Loring*, for the plaintiff.

*G. L. Huntress*, for the defendants.



ELIZABETH A. BARKER vs. METROPOLITAN LIFE  
INSURANCE COMPANY.

Middlesex. March 13, 14, 1905. — July 5, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, & HAMMOND, JJ.

*Insurance, Life.*

If a policy of life insurance provides that no obligation is assumed by the company unless at the date of the policy "the insured is alive and in sound health," the company is not liable if the insured dies from a mortal disease which he had at the date of the policy although he then appeared to be in sound health, and in an action on the policy an instruction that the plaintiff only need show that the insured at the date of the policy was in the same condition of health that he was in on the day that he made his application and was examined is erroneous. St. 1895, c. 271, now R. L. c. 118, § 21, relating to an "oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance" has no application to a condition in the policy itself.

LATHROP, J. This is an action of contract upon a policy of insurance in the sum of \$500, upon the life of Blaney P. Barker, payable to his wife, the plaintiff in this action. At the trial in the Superior Court, the jury returned a verdict for the plaintiff, and the case is before us on the defendant's exceptions.

The policy in question was issued on July 19, 1899. On its face it purports to be "In consideration of the answers and statements contained in the application for this policy a copy of which is hereto annexed as a part of this contract, . . . all of which answers and statements are hereby made warranties." The application, questions and answers are on the third page of the policy, the answers being in writing and the rest in print. The policy is also made "subject to the conditions set forth on the third page hereof, each and all of which are hereby made part of this contract and are accepted by the insured and assured as part hereof as fully as if herein recited." These conditions are printed.

The policy on the face contains the following clause: "No obligation is assumed by the company until the first premium has been paid nor prior to this date, nor unless upon this date the insured is alive and in sound health."



1. The first request for instructions is: "Upon all the evidence, the plaintiff cannot prevail, and the defendant is entitled to a verdict in its favor." It is contended by the defendant, in support of this proposition, that the insured had cystic disease of the kidneys at the time of the insurance, and that he died from that disease. The evidence is that at the time of the insurance, July 19, 1899, he appeared to be in good health; that on the ninth of the next month he was taken ill; that on the twenty-fourth of the same month, after a consultation with two physicians on the fourteenth, he was taken to the Framingham Hospital to be operated on; that the operation took place the same day, and one kidney was found covered and filled with cysts; that a radical operation was not deemed advisable, and only the large and superficial cysts were evacuated and the wound closed; that on August 30, pneumonia developed and on September 4 he died. There was also evidence from experts that the condition of the kidney found on August 24 could not develop from a sound condition in less time than several months; but there was evidence to the contrary, and this question was for the jury. *Emerson v. Metropolitan Ins. Co.* 185 Mass. 318, 320.

2. The second request for instructions was as follows: "If the insured, Blaney P. Barker, was not in sound health on the 19th day of July, 1899, the defendant is entitled to a verdict in its favor." The third request for instructions was as follows: "If on the 19th day of July, 1899, the insured, Blaney P. Barker, had cystic disease of the kidneys, or had cystic degeneration of the kidneys, or had tumors of the kidneys, he was not in sound health on that day, and the defendant is entitled to a verdict in its favor." The judge refused to give these instructions.

We are of opinion that these instructions should have been given, (unless these requests were covered by the charge,) as there was evidence in the case to sustain the allegations of fact contained in the requests.

The judge dealt with these requests in this manner: "One term of that contract, the last clause of the first page of the printed policy, is that no obligation is assumed by the company until the first premium has been paid in prior to this date, nor



unless upon this date the insured is alive and in sound health, this being dated the nineteenth day of July. So it is contended that it is necessary for the plaintiff, in order to recover, to show that Mr. Blaney P. Barker, on the nineteenth day of July, 1899, was in sound health; and I instruct you that you must be satisfied by a fair preponderance of the evidence that Blaney P. Barker, on the nineteenth day of July, 1899, was in the same condition of health that he was in on the day that he made his application and was examined; that that is the full extent to which this condition of the policy applies. In order to recover upon a contract which is itself made on condition, it is necessary that the condition should have been complied with; and so here, it is one of the conditions of that policy, without which it has no effect whatsoever, that Mr. Barker, the assured, should be in sound health when the policy was delivered; but, inasmuch as the company, by its own act, has made the representation, or warranty, of Mr. Barker in regard to the soundness of his health a warranty in the policy, I hold that it is not a condition except so far as I have already stated to you; it was a condition of that policy in effect, that Mr. Barker should have been in the same condition of sound health on the nineteenth day of July that he was on the day that he made his application and was examined by the physician. If any change occurred between those dates so that the condition of Mr. Blaney P. Barker was different when the policy was delivered from what it was at the time the corporation was acting in accepting the risk, then you should examine the policy in that respect and act accordingly. If you think, from a consideration of the evidence, that Mr. Barker's condition was [not] the same on the nineteenth day of July that it was when he was examined by the physician, when the application was made — that is, if the condition of Mr. Barker was not the same at the time they made the contract as it was when they decided to accept it, if you find that he was not in the same condition of sound health as he was when he was examined and made his application, then you would not have to go any further with the consideration of the case, but should return a verdict for the defendant."

The judge further in his charge reiterated this view of the law over and over again, and instructed the jury that "the law



now is that no representation made in the conditions or warranty in the policy of insurance by the assured, or in his behalf, would be deemed material, or void the policy to prevent its attaching, unless such representation or warranty is made with actual intent to deceive, or unless the matter would increase the risk of loss." The application for insurance contained the warranty: "I am now in sound health. I am not blind, deaf or dumb, nor have I any physical or mental defect or infirmity of any kind." But it contains also this clause: "And I further declare, warrant and agree that the representations and answers made above are strictly correct and wholly true; that they shall form the basis and become part of the contract of insurance if one be issued, and that any untrue answers will render the policy null and void, and that said contract shall not be binding upon the company, unless upon its date and delivery the insured be alive and in sound health."

The statute in force at the time the policy of insurance was dated was the St. of 1895, c. 271, which is now the R. L. c. 118, § 21. This relates merely to an "oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance." It has no relation to a condition in the policy itself.

The clause in the policy in question has been previously before the court. In *Gallant v. Metropolitan Ins. Co.* 167 Mass. 79, it was said by Chief Justice Field: "The company made its own contract, a part of which was that no obligation was assumed by the company unless at the time when the policy was issued the insured was 'alive and in sound health.' If in fact the insured at that time was not in sound health, the defendant is not liable on the policy, and this fact can be shown by any competent evidence."

In *Packard v. Metropolitan Ins. Co.* 72 N. H. 1, where the policy contained this clause, it was said by Mr. Justice Chase, after quoting the clause: "That they [the parties] had authority to limit the contract in this way cannot be doubted. *Dwight v. Insurance Co.* 103 N. Y. 341. The question to be considered arises upon this provision — not upon a representation or warranty made by the plaintiff in the application for insurance." And again: "No obligation was assumed by the defendants unless



the insured was alive and in sound health on the day of the date of the policy. The defendants' promise was not absolute, but conditional. The existence of life and sound health in the insured was a condition precedent to the promise of insurance."

The case of *Metropolitan Ins. Co. v. Howle*, 62 Ohio St. 204, is very similar to the case at bar. The plaintiff in error issued a policy, containing among other conditions one the same in substance as the one before us. There were also answers to interrogatories in relation to the health of the life insured, which it was contended were false. Section 8625 of the Revised Statutes of Ohio, provides as follows: "No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer." At the trial the original defendant requested the judge to instruct the jury as follows: "If you find that on the 30th day of November, 1894, the date of the policy, or when it was delivered to the plaintiff, Mrs. Sarah Howle [the life insured] was not in a state of sound health, you must find for the defendant." The judge refused to give this instruction, but instructed the jury as follows: "And if you find that on the 30th day of November, 1894—the date of the policy, or when it was delivered to plaintiff, Mrs. Sarah Howle was not in a state of sound health, and knowing that she was not in sound health, gave answers to these questions or received this policy because of the fraudulent answers which she had given to these questions, you should find for the defendant." The case was carried by a writ of error to the Supreme Court, and it was there held that the charge was erroneous, and that the instructions requested should have been given. It was said by Mr. Justice Burket: "The condition in the policy is that there shall be no obligation assumed by the company, unless upon the date of the policy the insured, the wife, shall be alive and in sound health. The matter of life and sound health is not made to



depend upon her knowledge thereof, but upon the fact itself. . . . The court mixed the law as to the condition in the policy, with the law applicable to answers to interrogatories in the application, and thereby committed an error. False answers to interrogatories are governed by Section 3625, Revised Statutes, but that section has no application to conditions contained in the policy itself. The charge should have been given as requested."

The judge in the case at bar committed the same error. He mixed the law applicable to negotiations for a policy of insurance with the law applicable to a condition in the policy itself.

There are many other requests for rulings which we need not consider. For the reason stated the order must be

*Exceptions sustained.*

G. W. Cox, for the defendant.

J. J. Shaughnessy, for the plaintiff.

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ANNIE AIKENS, administratrix, vs. NEW YORK, NEW HAVEN,  
AND HARTFORD RAILROAD COMPANY.

Suffolk. November 17, 1904. — July 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, & LORING, JJ.

*Way, Highway by prescription.*

If a private way laid out for the use of a farm and brick yard has been open to the public and has been used by the public to a certain extent, as shown by some cart ruts overgrown with grass leading to farm houses and by the fact that the public took advantage of the way being open to drive through it more or less, this is not enough, although covering a period of twenty years, to warrant a finding that the way has become a public highway by prescription.

LATHROP, J. This is an action of tort, under the Pub. Sts. c. 112, § 213, by the administratrix of the estate of John S. Aikens, to recover damages for the death of her intestate, who was killed by a locomotive engine, on January 18, 1899, while driving across the location of the defendant's road on a way called Freeman Street.



At the trial in the Superior Court, at the close of the evidence, the judge directed a verdict for the defendant. It was agreed by counsel that if the case should have been left to the jury upon the question whether there was a public highway by prescription over the railroad location upon Freeman Street, the plaintiff should have judgment for \$2,000. The judge, thereupon, at the request of the plaintiff, reported the case for the determination of this court. If upon the evidence the case should have been left to the jury, judgment was to be entered for the plaintiff in the sum of \$2,000 ; otherwise, judgment to be entered for the defendant.

It appears from a map used at the trial and referred to in the report that Freeman Street is in that part of Boston formerly Dorchester, and that it runs from Dorchester Avenue in a northerly direction by Faulkner Street to Charles Street. The location of the railroad is between Faulkner Street and Charles Street.

It was incumbent upon the plaintiff to show that there was a right of way by prescription over Freeman Street before the St. of 1892, c. 275, took effect. This act, which was approved May 6, 1892, provides as follows: "No right of way across any railroad track or location which is in use for railroad purposes shall hereafter be acquired by prescription; but nothing herein contained shall affect any existing right of way."

On October 4, 1871, a location of the railroad was filed, and subsequently another location was filed on October 30, 1879. In 1888, the defendant placed two gates across Freeman Street, one on either side of the track. These gates would be an interruption of any right by prescription then accruing. We need not consider what the effect of the location would be in 1871 and 1879; for we are of opinion that the evidence in the case did not warrant the jury in finding that a public right of way by prescription had been acquired in 1888.

All of the land in question, including the land where Faulkner Street, Freeman Street and Charles Street now are, formed part of the Jacob Foster farm, which contained one hundred acres. The farm house was on Foster Street, then a lane, now called Faulkner Street. There were clay pits on the farm, and a brick yard along Freeman Street. There was also a cottage



at the corner of Freeman Street and Faulkner Street, where the men working in the brick yard lived. In 1844 these were the only buildings on the farm.

We assume, without reciting the testimony, that there was some evidence of a general use by the public of Freeman Street for over twenty years before 1888. Such a use, if nothing more appeared, would be sufficient to show a right of way by prescription. *Jennings v. Tisbury*, 5 Gray, 78. *Commonwealth v. Coupe*, 128 Mass. 63. *McKenna v. Boston*, 131 Mass. 148. *Bassett v. Harwich*, 180 Mass. 585, 587.

But in the case at bar something more appears. The evidence in the case shows the origin of the way. It was laid out for the use of the farm and the brick yard thereon. Subsequently this private way, which was in fact open to the public, was used by the public to some extent, but it did not really come up to the level of a use which is in fact the use of a way as a public way. All that the evidence showed was that there were some cart ruts overgrown with grass, leading to farm houses, and that the public took advantage of the situation and drove through more or less. That user is not sufficient. See *Sprow v. Boston & Albany Railroad*, 163 Mass. 380; *Moffatt v. Kenny*, 174 Mass. 311, 314; *Weldon v. Prescott*, 187 Mass. 415.

As we are of opinion that there was no evidence to warrant the jury in finding that there was a way by prescription, there must be

*Judgment for the defendant.*

*A. Lincoln*, for the plaintiff.

*C. F. Choate, Jr.*, for the defendant.



BETHIAH B. KENDRICK vs. MARY F. KENDRICK.

MARY F. KENDRICK vs. ALICE E. KENDRICK.

Barnstable. November 30, 1904. — June 19, 1905.\*

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Husband and Wife. Marriage and Divorce. Domicil. Name.*

A married woman, to establish a right to a separate domicil for the purpose of maintaining a suit for a divorce in this Commonwealth under the provisions of R. L. c. 152, § 5, must prove affirmatively that she separated from her husband for a justifiable cause, and if she fails to sustain the burden of proof her domicil is held to follow that of her husband.

A decree of divorce obtained in another State is none the less valid here because in the libel and notice the libellee was called Bertha whereas her true name was Bethiah, if she was known by both names, and a finding that she was known by both names is justified if it appears that she was addressed by her husband as Bertha and in the family at least was known by both names.

TWO APPEALS from decrees of the Probate Court for the county of Barnstable, the first dismissing a petition of Bethiah B. Kendrick for an allowance as the widow of James S. Kendrick, and the second allowing a similar petition of Mary F. Kendrick as the widow of the same James, the appeal in the first case being taken by Mary F. Kendrick, and the appeal in the second case being taken by Alice E. Kendrick, a daughter of James and a legatee under his will.

The cases were heard by *Morton, J.*, who found the following facts:

“James S. Kendrick and Bethiah B. Kendrick, the petitioner in the first case, were married at Harwich in the county of Barnstable on January 15, 1851, and thereafter lived together as husband and wife in this Commonwealth until 1872 or thereabouts, when they removed from Edgartown where they were living, to Benton Harbor in the State of Michigan. There Mr. Kendrick engaged in business, and they resided there for about two and a half years. He was unsuccessful in business and came back to Edgartown, bringing his family and hiring

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\* The opinion in this case was withdrawn on an application for a rehearing. This was denied on September 5, 1905, when the case was returned to the Reporter.



and furnishing a tenement for them. His object in coming back to Edgartown was to get into the business, if he could, in which he formerly had been engaged, which was that of a seafaring man. But he was unsuccessful, and in a few months returned to Benton Harbor, leaving his family in Edgartown. There was no evidence that he became a citizen of Edgartown at this time, and I find that he did not become domiciled there, but that his domicile remained in Benton Harbor.

"After his return to Benton Harbor he wrote to his wife and sent her money from time to time. After remaining in Benton Harbor a short time, he sold out his business and settled up his affairs there and went to Dallas in the State of Texas, where he took up his residence and went into business. There was nothing secret or underhanded about the change from Benton Harbor to Dallas. It was a *bona fide* change, undertaken in the hope of bettering his condition, and without any intention, so far as appeared, of deserting or abandoning his family. Neither, so far as appeared, was there any intention on his part to abandon or desert his family when he went back to Benton Harbor from Edgartown.

"After leaving Benton Harbor for Dallas he did not send his wife any more money, his excuse being that he needed all the money he had to start himself in business. He wrote to her that he was going to Dallas, and wrote to her once or twice after he got there. She replied and wrote several letters, to which she received no answers, and then let the correspondence drop. She remained in Edgartown until forced, for want of means and by the sale of her household goods on execution, to leave and return to her mother, which she did. After remaining with her mother a short time, she came with her daughter to Boston, where she has since lived.

"I find, if it is competent, that after Kendrick went to Dallas, with the exception of small sums sent occasionally to the daughters, he did nothing towards the support of his wife and family. They supported themselves as they were able, by needlework. There was contradictory evidence admitted *de bene* as to whether Kendrick ever requested his wife to come to Michigan after his return to Benton Harbor, or to Dallas, after he went there. I find, if competent, that he did not. But according to her depo-



sition, which was read in evidence, Bethiah B. Kendrick testified, and I so find, that she did not want to go back to Michigan, though there was nothing to show that she told her husband so, or that he knew it. It did not appear whether she would have been willing to go to Dallas, if requested by him to come.

"I find that Kendrick acquired and had a *bona fide* domicile in Dallas from the time that he went there in 1875 until his removal to Yarmouth in this Commonwealth in 1893. In 1884 he filed a petition for a divorce from his wife in the District Court for the county of Dallas in Texas. The petition was under oath, and alleged among other things that his wife had abandoned him without any cause, and had remained absent from him with the intention of never living with him again and refused to live with him. There was some testimony, consisting of declarations of Kendrick, tending to show that this was so. What the actual facts were, if competent, I am unable to determine.

"The District Court in which the proceedings were instituted was a court of record and had jurisdiction in matters of divorce, and the proceedings were in all respects conformable to the laws of Texas. The service was by publication, and the wife had no knowledge of the pendency of the proceedings, and no notice except the constructive notice furnished by the publication of the citation. Service of the citation as ordered was duly returned, and after due hearing, a divorce from the bonds of matrimony was granted to the husband, on the ground of desertion. The wife was informed, at least as early as 1886 or 1887, of the divorce, and so far as appears, never has assented to the divorce or questioned until now its validity.

"In the petition and the citation, the wife's name was given as Bertha B. Kendrick, her real name being Bethiah B. Kendrick. But it appeared, and I find as a fact, if competent, that she was addressed as Bertha by her husband and that she was known by that name to some extent, though it did not appear that she was so known outside the family. I also find that the court had before it a copy of the marriage certificate in which the name of the respondent was given as Bethiah, that no fraud or imposition was practised upon it in respect to the name of the respondent, and that the person from whom the court intended to grant the divorce was the petitioner Bethiah B. Kendrick.



I also find that, if there was any error in the name, it did not appear that any one was misled, or, taking all the circumstances into account, would have been misled by it.

"James S. Kendrick was married to the petitioner Mary F. Kendrick July 25, 1894, at South Yarmouth, in this State, and lived with her until he died. No question was raised as to the amount or propriety of the allowance, if she was the widow.

"The above constitute all the material facts, and upon them counsel for Bethiah B. Kendrick and Alice E. Kendrick asked me to rule and find that the Texas divorce was invalid, and that Bethiah B. Kendrick was the widow. I refused so to rule, and ruled and found that the divorce was valid and that Mary F. Kendrick was the widow, and ordered the decrees of the Probate Court to be affirmed."

The justice reported the cases for determination by the full court. If his ruling was right, the decrees of the Probate Court were to be affirmed; otherwise, such orders and decrees were to be made as to the full court should seem meet.

The case was argued at the bar in November, 1904, before *Knowlton, C. J., Morton, Barker, Hammond, & Loring, JJ.*, and afterwards was submitted on briefs to all the justices.

*G. A. King*, for Bethiah B. Kendrick and Alice E. Kendrick.

*C. C. Paine*, for Mary F. Kendrick.

LORING, J. The appellants contend that the decree of divorce obtained by the deceased in Texas in 1884 is void for lack of jurisdiction. Their first ground in support of this contention is stated by their counsel to be that the domicil of the wife at the time of the divorce was in Massachusetts, and she might have obtained a divorce in Massachusetts from her husband at the time when he obtained a divorce from her in Texas.

The single justice found that Bethiah and her husband were married in Massachusetts in 1851 and lived in this State as husband and wife until 1872, when they moved to Benton Harbor in the State of Michigan; that they lived there for two years and a half, and both became domiciled there; that on the expiration of this two years and a half they came back together to Edgartown, Massachusetts, temporarily, in search of work for the husband, but their domicil remained in Benton Harbor; that after a few months the husband returned to Benton Harbor, leaving



his family in Massachusetts, and after remaining a short time in Benton Harbor sold out his business there and went to Texas, where he took up his residence and went into business; that the move to Texas was "a *bona fide* change, undertaken in the hope of bettering his condition, and without any intention, so far as appeared, of deserting or abandoning his family. Neither, so far as appeared, was there any intention on his part to abandon or desert his family when he went back to Benton Harbor from Edgartown. After leaving Benton Harbor for Dallas he did not send his wife any more money, his excuse being that he needed all the money he had to start himself in business. He wrote to her that he was going to Dallas, and wrote to her once or twice after he got there. She replied and wrote several letters, to which she received no answers, and then let the correspondence drop. She remained in Edgartown until forced, for want of means and by the sale of her household goods on execution, to leave and return to her mother, which she did. After remaining with her mother a short time, she came with her daughter to Boston, where she has since lived. I find, if it is competent, that after Kendrick went to Dallas, with the exception of small sums sent occasionally to the daughters, he did nothing towards the support of his wife and family. They supported themselves as they were able, by needlework. There was contradictory evidence admitted *de bene* as to whether Kendrick ever requested his wife to come to Michigan after his return to Benton Harbor, or to Dallas, after he went there. I find, if competent, that he did not. But according to her deposition, which was read in evidence, Bethiah B. Kendrick testified, and I so find, that she did not want to go back to Michigan, though there was nothing to show that she told her husband so, or that he knew it. It did not appear whether she would have been willing to go to Dallas, if requested by him to come. I find that Kendrick acquired and had a *bona fide* domicil in Dallas from the time that he went there in 1875 until his removal to Yarmouth in this State in 1893. In 1884 he filed a petition for divorce from his wife in the District Court for the county of Dallas in Texas. The petition was under oath, and alleged among other things that his wife had abandoned him without any cause, and had remained absent from him with the intention of never living



with him again and refused to live with him. There was some testimony, consisting of declarations of Kendrick, tending to show that this was so. What the actual facts were, if competent, I am unable to determine."

To establish a right to a separate domicile for the purpose of divorce under R. L. c. 152, § 5, or otherwise, the burden is on the wife to prove a *delictum* by the husband. In this case the wife had to prove that her husband deserted her and not she her husband. This the wife failed to do. For the purposes of this case, therefore, her domicile must be taken to have followed that of her husband, and was in Texas at the date of the divorce granted to her husband. See *Loker v. Gerald*, 157 Mass. 42; *Burtis v. Burtis*, 161 Mass. 508.

The second ground of the appellants in support of their contention that the Texas court had no jurisdiction is that the name of the wife was Bethiah and in the libel for divorce and notice she is called Bertha. The judge who heard the petition found "that she was addressed as Bertha by her husband and that she was known by that name to some extent, though it did not appear that she was so known outside the family. I also find that the court had before it a copy of the marriage certificate in which the name of the respondent was given as Bethiah, that no fraud or imposition was practised upon it in respect to the name of the respondent, and that the person from whom the court intended to grant the divorce was the petitioner Bethiah B. Kendrick. I also find that, if there was any error in the name, it did not appear that any one was misled, or, taking all the circumstances into account, would have been misled by it."

We interpret the qualification with which the first finding ends to mean that the plaintiff did not introduce direct evidence that Bethiah was known as Bertha outside the family, and not to mean that she was not so known outside the family. The finding therefore is a finding that, in the family at least, she was known by both names.

We are of opinion that this is a finding that she was known by both names within the rule applied in *Commonwealth v. Gale*, 11 Gray, 320; *Gifford v. Rockett*, 121 Mass. 481; *Gillespie v. Rogers*, 146 Mass. 610; *Commonwealth v. Seeley*, 167 Mass. 163. See in this connection *State v. Dresser*, 54 Maine, 569.

*Decrees of Probate Court affirmed.*



**HENRY J. CUNNINGHAM vs. MAYOR OF CAMBRIDGE  
& another.**

Suffolk. January 26, 1905. — June 22, 1905.\*

**Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.**

*Municipal Corporations, By-laws and ordinances. Mandamus. Cambridge,  
Chief of police.*

A chief of police appointed under an ordinance of a city providing that the chief of police shall hold his office during the pleasure of the board of aldermen, if he is removed by the board of aldermen without a hearing, cannot maintain a petition for a writ of mandamus to compel his reinstatement on the ground that the provisions for removal in the ordinance under which he was appointed are contrary to the provisions of the charter of the city, for if the ordinance is invalid his appointment was illegal.

LATHROP, J. This is a petition for a writ of mandamus. The petitioner alleges that on June 30, 1903, he was a resident citizen of the city of Cambridge, and was duly appointed chief of police of that city by the mayor thereof, subject to confirmation by the board of aldermen, and that on July 19, 1903, his appointment was duly confirmed by the board of aldermen, and he entered upon the duties of his office as chief of police, and continued to hold the office until January 20, 1904; that on January 19, 1904, the respondent Daly, the then mayor of the city, notified the petitioner that he had appointed the respondent Pullen to succeed the petitioner as chief of police; that on the same day the mayor notified the board of aldermen of the action he had taken; and that on January 26, 1904, the board of aldermen adopted an order ratifying and confirming the action of the mayor.

The prayer of the petition is to compel the mayor to recognize the petitioner as chief of police of said city, and to reinstate him in office, and to compel Pullen to abstain from performing the duties of the chief of police, and to refrain from interfering

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\* The opinion in this case was withdrawn on an application for a rehearing. This was denied on September 5, 1905, when the case was returned to the Reporter.



with the petitioner in the lawful performance of his duties as such chief of police.

The case was heard by a single justice of this court, who found that the office of chief of police was not under civil service rules and regulations, (see R. L. c. 26, § 19,) ordered the petition dismissed, and reported the case for our consideration.

Chapter 20, § 1, of the revised ordinances of the city of Cambridge provides: "The police department shall be under the charge of the chief of police, who shall hold his office during the pleasure of the mayor and aldermen," and then goes on to prescribe his duties.

The revised charter of the city, St. 1891, c. 864, in § 9 provides: "All officers of the city not elected by the qualified voters shall be resident citizens of the city of Cambridge, and shall, except as herein otherwise provided, be appointed by the mayor, subject to confirmation by the board of aldermen, and for such terms respectively as are or may be fixed by law or ordinance," etc. Section 10 provides: "The mayor after due hearing may, with the approval of a majority of the board of aldermen, remove . . . any member of the police force."

The petitioner contends that the ordinance above referred to merely prescribes a tenure of office and not a term of office, and that it does not therefore comply with § 9 of the charter; and that as he was removed without a hearing he is entitled to be reinstated. We have been addressed with a learned argument in support of these propositions.

However important these questions may be, we do not find it necessary to determine them in this case. The ordinance is either valid or invalid under the charter. If it is valid the petitioner has no ground of complaint. If it is invalid, as he was appointed under the same ordinance, his appointment was illegal, and he has no standing in court. *Loper v. Millville*, 24 Vroom, 862, 868.

In the opinion of a majority of the court the order must be

*Petition denied.*

The case was argued at the bar in January, 1905, before Knowlton, C. J., Morton, Loring, & Braley, JJ., and afterwards was submitted on briefs to all the justices.

*J. J. McCarthy & W. J. O'Donnell*, for the petitioner.

*G. A. A. Pevey*, for the respondents.



**MARY E. C. CARROLL vs. JOHN A. CARROLL.**

Worcester. March 9, 1905. — June 22, 1905.\*

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Joint Tenants and Tenants in Common. Landlord and Tenant. Practice, Civil, Auditor's report.*

The mere occupation by one of two tenants in common of the premises owned in common does not render him liable to his co-tenant in an action for use and occupation, but if there is an agreement to pay rent, although no amount is named, the tenant in possession may be held to account to his co-tenant for the reasonable rent of the property used and occupied by him.

When in an action of contract the only evidence on a certain claim of the plaintiff is an auditor's report finding generally for the plaintiff and the testimony of the defendant denying the agreement or understanding on which the claim is based, a judge sitting without a jury may sustain the plaintiff's claim, as the finding of the auditor upon the general question of liability may furnish evidence of facts which are involved in or may be inferred from the general finding, and may cause the judge to disbelieve the testimony of the defendant.

Although, in the absence of an agreement on the subject, one of two tenants in common cannot charge his co-tenant a commission on rents collected as compensation for care of the property, yet an agreement to pay such a commission or compensation will be enforced.

LATHROP, J. This is an action of contract, with a count on an account annexed, for money lent by the plaintiff to the defendant. In the Superior Court the case was sent to an auditor who made a report which was in general in favor of the plaintiff. On the coming in of the report, the case was tried before a judge of that court without a jury. No question was raised as to the pleadings. The auditor's report was put in evidence, and the plaintiff and the defendant testified. The judge found for the plaintiff, and the case is before us on the defendant's exceptions. But two items are in dispute, which we will consider separately.

1. The auditor found that the plaintiff and the defendant were tenants in common of certain lands and buildings in Worcester; that by the consent and acquiescence of the de-

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\* The opinion in this case was withdrawn on an application for a rehearing. This was denied on September 5, 1905, when the case was returned to the Reporter.



fendant the plaintiff had the care of the property, collected most of the rents, and out of the rents paid interest on mortgages, taxes, repairs, and other expenses connected therewith; that the defendant occupied an office on Green Street in one of the buildings owned in common, from January, 1897, until August 8, 1902, and that the defendant should be charged with the rent of the office from July, 1898, to August 8, 1902, at the rate of ten dollars per month, which he found to be the fair rental value.

At the trial in the Superior Court the defendant testified that he occupied the premises as found by the auditor, but that there never was any understanding that he should pay rent, and that no demand had been made upon him. The bill of exceptions states that this was the only evidence upon the subject in addition to the auditor's report. The plaintiff was also charged by the auditor for rent of the premises occupied by her, but for an amount much less than that charged the defendant.

The judge refused to give the third request for instructions, which was: "That there is no evidence that it was understood that the plaintiff or defendant was to pay rent for the part of the premises occupied by each."

The mere occupation of premises owned in common by one of two co-tenants does not entitle his co-tenant to call him to account, or render him in any way liable to an action for the use and occupation of the estate. *Badger v. Holmes*, 6 Gray, 118. *Brown v. Wellington*, 106 Mass. 818. *Kirchgassner v. Rodick*, 170 Mass. 543. But if there is an agreement, although not definite in amount, by one tenant in common who is in occupation to pay his co-tenant therefor, this is enough to take his case out of the general rule, even if no amount is mentioned. *Kites v. Church*, 142 Mass. 586. Evidently the auditor found that such an agreement had been made, and was justified in holding both parties to account for the reasonable rent of the respective parts of the property used and occupied by each.

The auditor's report is made by statute *prima facie* evidence. R. L. c. 165, § 55. And, as the defendant admits, a finding upon the general question of liability may furnish the evidence of facts which are involved in and may be inferred from that general finding. *Peru Steel & Iron Co. v. Whipple File & Steel*



*Manuf. Co.* 109 Mass. 484. *Holmes v. Hunt*, 122 Mass. 505, 515. *Newell v. Chesley*, 122 Mass. 522, 524. *Quin v. Bay State Distilling Co.* 171 Mass. 288, 290.

The auditor's report was in evidence, and the judge was not bound to believe the testimony of the defendant.

2. The bill of exceptions states that the auditor allowed the plaintiff \$340.88 as a five per cent commission on rents collected by her as compensation for the care of the property; and this the judge allowed. We are of opinion that this is governed by what has already been said.

*Exceptions overruled.*

*A. Lincoln*, for the defendant.

*J. B. Ratigan*, (*J. E. Swift* with him,) for the plaintiff.



**MARY A. WALKER vs. LANCASHIRE INSURANCE COMPANY.**

Bristol. November 14, 1904. — September 6, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Insurance, Fire, Sworn statement of loss. Interest. Exceptions.*

In an action on a fire insurance policy, where the defence set up was the alleged failure of the plaintiff forthwith to render to the company a sworn statement of loss as required by the policy, it appeared, that the property insured consisted of household goods and furniture, that the fire occurred on November 26, that the company received notice of it within forty-eight hours and sent an adjuster with authority to adjust the loss, that the adjuster wrote to the plaintiff on December 7, asking for a written statement of loss, that between December 7 and December 19 an inquest was held by the fire marshal which was attended both by the plaintiff and the adjuster, that on December 19 the plaintiff signed and made oath to a written statement of loss in the form and with the particulars required by the policy, and delivered it to the defendant's agent who had issued the policy to the plaintiff, and who had no authority to adjust losses but had authority to receive proofs of loss for the purpose of forwarding them to the defendant, that with the consent of this agent the written statement immediately thereafter was taken away by the plaintiff for the purpose of making a copy of it, that the plaintiff returned the statement to the agent on February 23, no request appearing to have been made for it in the meantime, and thereupon it was sent to the defendant, which received it on March 15 and retained it without objection, and that more than a month afterwards the receipt of the statement of loss was acknowledged by the adjuster without making any objection to it. The



judge hearing the case without a jury found that the defendant had waived a strict compliance with the condition of the policy, and found for the plaintiff. *Held*, that, taking all the circumstances into account, the court could not say that the finding of the judge that the defendant had waived a strict compliance with the condition was not warranted, and that what took place on December 19, when the plaintiff delivered the statement to the agent, could be found to have been a good delivery of the statement of loss to the defendant.

Where the defendant in an action of contract has been summoned as trustee of the plaintiff in an action previously brought against the plaintiff and still pending, the plaintiff, if he prevails, is not entitled to interest from the date of his writ but only to the date of the service of the trustee process on the defendant.

Where exceptions of the defendant in an action of contract, otherwise overruled, are sustained on the ground that interest has been allowed from the date of the writ when it should have been allowed only to a previous date when the defendant was summoned as trustee of the plaintiff in another action still pending, the court may make an order that the exceptions shall be overruled if the plaintiff remits the amount of excessive interest, or otherwise shall be sustained.

MORTON, J. This is an action of contract on a policy of fire insurance to recover for a total loss by fire of the property covered by the policy which consisted of household goods and furniture contained in "the frame building formerly occupied as a private barn, owned by Francis Bump, situate on the west side of Broadway in the village of North Raynham, Mass." The case was sent to an auditor and was heard by a judge of the Superior Court without a jury upon his report, it being agreed that certain facts found by him should be taken to be true so far as competent and material. Certain other facts also were agreed. The judge found for the plaintiff, and the case is here on exceptions by the defendant to the finding and to the refusal of the judge to give certain rulings that were requested.

The policy provides amongst other things that, "In case of any loss or damage under this policy a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and the manner in which the fire originated, so far as known to the insured." The fire occurred on November 26, 1899, and the statement was rendered according to the plaintiff's contention on December 19, and according to the defendant's contention not till March 15. The defendant further



contends that even if the statement is regarded as having been rendered on December 19, that was not forthwith within the meaning of the policy, and that there was no waiver by it of the requirement that it should be so rendered. This is the principal question in the case. There is also a question of interest:—the defendant having been trustee and contending that it is not chargeable with interest, but the court having allowed interest from the date of the writ.

The policy was issued at Taunton through the agency of Hammond, Morse and Company, who had authority to receive applications, take risks, countersign and issue policies and receive the premiums therefor. It bore the lithographed signature of the "Manager of the Eastern Department" and was countersigned "at Taunton" by "Hammond, Morse & Co., Agents." The latter received the application, accepted the risk, took the premium, and as already stated issued the policy to the plaintiff. It is agreed that Hammond, Morse and Company had no authority to adjust losses, but had authority to receive proofs of loss for the purpose of forwarding them to the company. The company received notice of the fire within forty-eight hours through its local agents and immediately sent out its adjuster with authority to adjust the loss. He called on the plaintiff and interviewed her about the fire and subsequently on December 7 wrote her as follows: "I have to advise you that if you consider that you have a valid claim against the Lancashire Ins. Co. by reason of recent fire destroying certain furniture belonging to you in No. Raynham, you will kindly forward the written statement called for by the statutes and the policy." This was duly received by her, and certainly affords ground for the contention that it operated as a waiver of any delay that might have already occurred. Whether it constituted a waiver as matter of law it is not necessary to consider. Between the 7th and 19th of December a fire inquest was held by the marshal which was attended both by the plaintiff and the adjuster. What communications, if any, there were between the plaintiff and the adjuster during this interval does not appear. But it would be extraordinary if the subject of the loss was not referred to, and it is possible that facts brought out at the inquest may have seemed to the adjuster to render a proof



of loss of minor consequence. On December 19, the plaintiff signed and made oath to a written statement of her loss in the form and with the particulars required by the policy, and on the same day it was delivered by her counsel to Hammond, Morse and Company and with their consent immediately taken away by him in order that he might make a copy of it. He returned it on February 23, no request appearing to have been made for it in the meantime, and it was thereafter sent to the defendant, the latter receiving it on March 15 and retaining it without objection. Neither was any objection made by the adjuster who acknowledged the receipt of it in a letter written more than a month afterwards. This, and the conduct of the company, are only material as tending to throw light upon and explain previous conduct. It is to be noticed that the property insured consisted of household goods and furniture. The auditor found, if not concluded by the referee's award, that the plaintiff's loss was \$2,000, showing that there was a large quantity of furniture. And it well might be that in view of the inquest and the nature of the property, the time that elapsed from December 7, when the adjuster wrote to the plaintiff calling her attention to the matter of the proof of loss, to December 19, when it was given to Hammond, Morse and Company, was not unreasonable.

Taking all of the circumstances into account we do not see how it can be said that the presiding judge was not warranted in finding that the defendant had waived strict compliance with the condition, and that, assuming that what took place constituted a valid delivery, the giving of the proof of loss to Hammond, Morse and Company on December 19 was a performance of the condition. *Eastern Railroad v. Relief Ins. Co.* 105 Mass. 570. *Searle v. Dwelling House Ins. Co.* 152 Mass. 263. *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 382. *Mandell v. Fidelity & Casualty Co.* 170 Mass. 173. It is plain, however, that if the proof of loss was not delivered till March 15 when it was received by the defendant company the condition was not performed. And the defendant contends that what took place on December 19 did not amount to a delivery of the proof of loss to Hammond, Morse and Company. It bases this contention on the fact, which is agreed, that Hammond, Morse and Company had apparent authority to receive proofs of loss for the



purpose of forwarding them to the company, and had no authority to adjust losses. We construe this to mean that they had no authority to adjust losses but did apparently have authority to receive proofs of loss. Whether their authority was strictly limited as between themselves and the company to the mere function of receiving and forwarding proofs of loss is, it seems to us, immaterial. There is nothing to show that any such limitation on their apparent authority was known to the plaintiff and she cannot, therefore, be affected thereby. *Markey v. Mutual Benefit Ins. Co.* 108 Mass. 78. *Harnden v. Milwaukee Mechanics' Ins. Co.* 164 Mass. 382. *Parker & Young Manuf. Co. v. Exchange Ins. Co.* 166 Mass. 484.

If the proof of loss had been delivered to the defendant company and then immediately taken away with the defendant's consent by the plaintiff or her counsel for the purpose of making a copy of it, there can be no question, we think, that there would have been a good and sufficient delivery of the proof of loss. And we think that it was within the apparent scope of the authority of Hammond, Morse and Company to allow the same thing to be done. There is no finding that the proof of loss was not delivered and borrowed in good faith, or that there was any intention in what was done to evade the conditions of the policy. The finding of the judge in favor of the plaintiff must be taken to negative anything of the kind. The fact that the proof of loss was retained so long a time cannot in the absence of any finding of a want of good faith invalidate the transaction. We think that what took place could be found to constitute a good delivery of the proof of loss.

The remaining question relates to the matter of interest. The defendant was summoned as trustee of the plaintiff in an action against her by C. E. Osgood and Company. That action was brought before this and is still pending. Referees were appointed under the policy and made an award in favor of the plaintiff before this action was brought. The defendant contended that if liable at all it was only liable for the amount of the award, and also asked the judge to rule that if entitled to recover the plaintiff was not entitled to interest. The judge found for the plaintiff for the amount of the award with interest from the date of the writ. We think that the allowance of



interest was erroneous. "It is well settled that, when one summoned as trustee is indebted to the principal defendant upon a demand where interest would be recoverable by the principal defendant only as damages for breach of contract, interest will not be deemed to accrue during the pendency of the trustee process." *Smith v. Flanders*, 129 Mass. 322. *Huntress v. Burbank*, 111 Mass. 213. *Bickford v. Rich*, 105 Mass. 340. *Oriental Bank v. Tremont Ins. Co.* 4 Met. 1. The exceptions are sustained on this point only. But as the amount of interest thus allowed is easily computed, if the plaintiff will remit that amount when ascertained the exceptions may be overruled; otherwise, they will be sustained.

*Ordered accordingly.*

The case was submitted on briefs at the sitting of the court in November, 1904, and afterwards was submitted on briefs to all the justices.

*F. W. Brown*, for the plaintiff.

*A. Fuller & W. J. Davison*, for the defendant.

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CECIL P. WILSON *vs.* MASSACHUSETTS INSTITUTE OF  
TECHNOLOGY.

MARY I. WELLS *vs.* SAME.

Suffolk. December 1, 1904. — September 6, 1905.

Present: MORTON, LATHROP, BARKER, HAMMOND, LORING, & BRALEY, JJ.

*Equitable Restrictions. Massachusetts Institute of Technology.*

St. 1861, c. 183, which incorporated the Massachusetts Institute of Technology, granted to that corporation the right to hold and occupy the westerly portion of a certain square of land then belonging to the Commonwealth between Newbury Street and Boylston Street in Boston "to the extent of two thirds part thereof, free of rent or charge by the Commonwealth," and provided in § 3 that the square in question should "be reserved from sale forever, and kept as an open space, or for the use of" the educational institutions named in the act, and in § 7 that the corporation above named, and another educational corporation to which a similar grant was made as to the remaining third of the square, should "not cover with their buildings more than one third of the area granted to



them respectively." These grants were made in pursuance of a scheme, proposed by the petitioners for the grants, that the square in which the rights were granted should be dealt with in such a way as to enhance the value of the surrounding lots belonging to the Commonwealth, so that their increase in value should equal the value which the reserved square had before the adoption of the plan, and the Commonwealth thus should be reimbursed for the space withdrawn from sale. This scheme was carried out, and the lots surrounding the square belonging to the Commonwealth, after having been reserved under § 8 of the act until the square was built upon and improved by the two educational corporations, were sold at auction in accordance with a plan signed by the commissioners of public lands, which was referred to in the advertisements, and a copy of which was pasted in the catalogues of the sales. On this plan the reserved square was shown with the buildings of the two corporations and the open spaces drawn upon it. St. 1903, c. 438, released to the Massachusetts Institute of Technology all the right, title and interest of the Commonwealth by way of right of re-entry or otherwise in the westerly two thirds of the square, and provided that that corporation "subject to the rights, if any, of other parties" might erect upon all or any part of the premises buildings conforming to the building laws of the city of Boston and in accordance with certain restrictions set forth in the act. The owners of two lots on one of the streets facing the square, which had been purchased respectively at two of the auction sales above described, brought suits in equity against the Massachusetts Institute of Technology to restrain that corporation from covering with its buildings more than one third of the land assigned to it by St. 1861, c. 183. *Held*, that the provisions of §§ 8 and 7 of the last named act, that the square should be reserved from sale forever, and kept as an open space, or for the use of the educational institutions named in the act, and that these institutions should not cover with their buildings more than one third of the area granted to them respectively, were addressed to the future purchasers of the surrounding lots as the basis on which those lots were to be sold, and the lots of the plaintiffs having been bought on the faith of these declarations, an equitable contract was created which could be enforced specifically as a restriction on the land held by the defendant, and that the plaintiffs were entitled to decrees enjoining the defendant from erecting any building or buildings covering more than one third of the area assigned to it by St. 1861, c. 183.

THE following statement of the case is taken from the opinion of the court:

These are two bills in equity reserved for the consideration of the full court upon the pleadings and agreed facts. They are brought by the owners of two lots of land on Newbury Street in the city of Boston, facing the square on which the buildings of the defendant and those of the Boston Society of Natural History now stand, for the purpose of having the defendant enjoined from covering with its buildings more than one third of the land "granted" to it by St. 1861, c. 183, as it is authorized to do by St. 1903, c. 438, "subject to the rights, if any, of other parties." The bills proceed on the ground that by the sale under this act



(St. 1861, c. 183) of these and other lots surrounding the square, an equitable restriction was imposed upon this square for their benefit, which includes the right they now seek to enforce.

By §§ 1 and 2 of St. 1861, c. 183, the defendant is incorporated. By § 3 it is provided that the square in question "shall be reserved from sale forever, and kept as an open space, or for the use of such educational institutions of science and art as are hereinafter provided for." By § 4 it is provided that the defendant shall hold, occupy and control the westerly two thirds of said square, subject to the "stipulations" specified, and by § 5 it is provided that the Boston Society of Natural History "shall be entitled to hold, occupy and control" the easterly one third on certain provisions there specified. By § 6 it is provided that the rights and privileges given in the last two sections are granted subject to certain "further conditions" there specified. Then comes § 7, relied on by the plaintiffs, to wit: "The above named societies shall not cover with their buildings more than one-third of the area granted to them respectively." By §§ 8 and 9 the commissioners on the Back Bay are "instructed to reserve from sale the lots fronting on said square on Boylston, Clarendon and Newbury Streets, until said societies shall, by inclosure and improvements, put said square in a sightly and attractive condition," and it is directed that an appraisal shall be made of all the surrounding lots (except those on Berkeley Street which already had been sold) and of the square in question; and if the surrounding lands when sold do not equal the appraised value of the two (the surrounding lots and the square) the two societies shall pay the amount of the deficit to the Commonwealth for the school fund, to which the proceeds of the sale of these lands had been appropriated by the Legislature.

St. 1861, c. 183, was enacted on a petition asking for the incorporation of an institution "to be entitled the Mass: Institute of Technology," and that "a section of land on the Back Bay may be reserved and granted to the use of said Institute on such terms and conditions as may be deemed most conducive to the objects of the Institute and the industrial and educational interests of the Commonwealth," and on a petition by the Boston Society of Natural History asking for a similar



grant. These petitions were referred to the joint standing committee on education, who made a report which was set forth in the agreed facts and which is printed at the end of this statement, beginning with page 572. This committee reported a bill which is not made a part of this case, but "shortly afterwards the Act of St. 1861, c. 183, was passed" on April 10, 1861.

On September 5, 1861, the appraisal called for by § 9 was completed, and the land in the square and the land in the surrounding lots on Boylston, Newbury and Clarendon Streets was appraised at \$1.05 a foot.

A word as to what the Back Bay lands were will explain the occasion of the "grant" to these petitioners.

What is now known as the Back Bay district of Boston was originally flats covered by the ebb and flow of the tide, and used for mill purposes. It became desirable to change the use of these flats from mill purposes to land purposes. The title to these flats was in the Commonwealth and the companies which owned the right of flowage. Before 1857 the Commonwealth had by an adjustment got title to all the land shown on the plan which was adopted by the Back Bay commissioners appointed under Resolve 1852, c. 79, and annexed to their fifth annual report rendered in January, 1857. A reduced copy of this plan is printed opposite page 571. The Commonwealth had determined to fill and sell these lands, and had laid out the land for that purpose by the adoption of this plan. See *Commonwealth v. Roxbury*, 9 Gray, 451; Fifth Annual Report of the Commissioners on the Back Bay; Report of the Commissioners appointed under Resolve of 1856, c. 76, with accompanying documents, printed in Senate Document No. 17, for the year 1857; Resolves 1852, c. 79; 1855, c. 60; 1856, c. 76; 1857, c. 70; Sts. 1857, c. 169; 1859, c. 154; 1860, c. 200, § 5. The Commonwealth had thus come into an extensive territory from the sale of which a large profit was expected to result, after the cost of filling had been met. In 1861, when the act in question was passed (St. 1861, c. 183), these flats or lands were "being filled, but at that time, with other large tracts to the west and south, were almost entirely vacant, the residence portion of the city being east of Arlington Street and the business portion still more to the east."



The lots surrounding the square in question (forty-six in number) were sold at four different auction sales, severally held on September 29, 1863, May 19, 1864, October 26, 1865, and April 10, 1869. The lot now owned by the plaintiff Wilson was bought at the second, and the lot now owned by the plaintiff Wells at the third, of these sales. A plan annexed to the agreed facts sets forth the actual price received by the Commonwealth from the sale of the forty-six surrounding lots. It is stated by the plaintiffs and not contradicted by the defendant that this plan shows that these forty-six surrounding lots were sold for \$2.46½ a foot, and that the Commonwealth received from these sales \$90,884.06 over and above the appraised value of the square here in question plus the appraised value of the surrounding lots under § 9 of St. 1861, c. 183.

As both the plaintiffs on the one hand and the defendant on the other hand have sought support from the way these sales were conducted, a short statement of it is necessary.

The surrounding lots consisted of twenty-two on Boylston Street, twenty-two on Newbury Street, and two on Clarendon Street. The lots fronting the square on Berkeley Street had been sold before St. 1861, c. 183, was enacted, as we already have said; and, as we have said, all that were sold after that act were sold at public auction. Those on Boylston Street were sold on September 29, 1863. The twenty-two lots on Newbury Street were offered for sale on May 19, 1864, and fifteen of them were sold then. The remaining seven were sold on October 26, 1865, and the two lots on Clarendon Street were sold on April 10, 1869.

In case of all forty-six lots the purchaser took a bond for a deed, followed by a conveyance later,—in one instance twenty-eight years later. The explanation for this course of conducting the transaction is obvious; so long as the title to it stood in the Commonwealth a lot of land was not subject to taxation by the local authorities.

The four auction sales were advertised. The advertisements of the sales at which the two lots now owned by the plaintiffs were bought ended with this statement: "Catalogues with plans showing the situation and area of the several lots to be sold, and the minimum price of each, together with form of deed to be



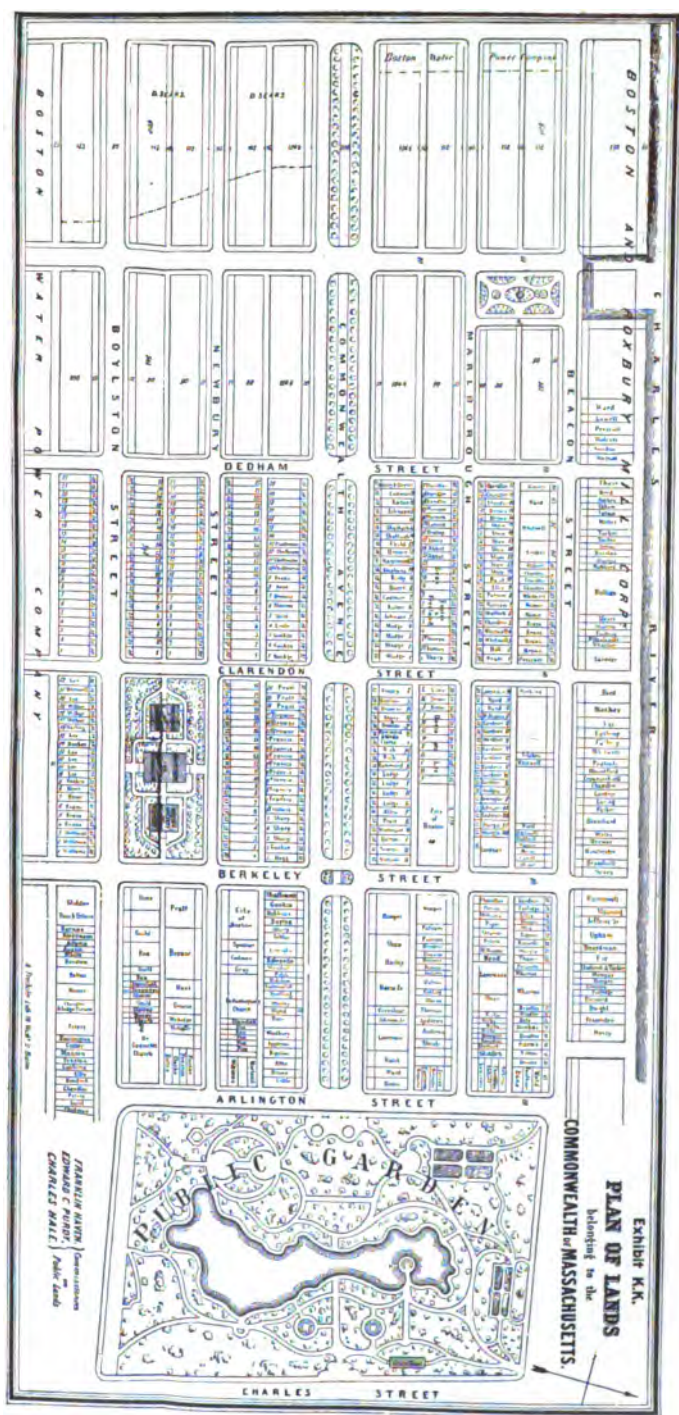
given by the commissioners and full particulars in regard to the restrictions and stipulations to be incorporated therein, may be obtained" at the office of the commissioners.

The catalogue in case of the first of these two auction sales (the second of the four) covered lots on Commonwealth Avenue as well as the twenty-two lots in question on Newbury Street; and in case of the second of these two sales, (the third of the four,) besides the seven lots here in question, other lots on Newbury Street and lots on Commonwealth Avenue and Beacon Street.

The plan referred to in the concluding paragraph of the advertisement was pasted inside the catalogue. It was the only statement contained in the catalogue of what was to be sold and of the upset prices fixed by the commissioners with the approval of the Governor. It was not otherwise referred to in the catalogue. A copy of the plan so referred to in the advertisement and pasted in the catalogue at the first of these two sales (the second of the four) shows this square laid out as provided in St. 1861, c. 188. A reduced copy of this plan is printed opposite this page. The plan referred to in the advertisements and pasted in the catalogue at the second of these sales (the third of the four) was the same as the one above mentioned, with this difference: In the one used at the later sale the names of the purchasers of the several lots sold at the former sale were added. The plans used at the first and fourth sales were also the same, with similar differences as to the absence or presence of the names of purchasers of lots.

The form of deed referred to in the catalogues for the first three of the above four sales was a printed form adopted before St. 1861, c. 188, and apparently used for the sale of all lots on the Back Bay indifferently. It referred to the plan of 1857 alone. It will be observed that on this plan the land is not divided into lots. After November, 1866, the form of deed set forth in the catalogues referred "also to the plan recorded with Suffolk Deeds at the end of Book 885," which is in fact a plan showing the square here in question laid out as provided in St. 1861, c. 188. Of the forty-six lots here in question only two, namely, those on Clarendon Street, were sold under such a catalogue.











Two plans were referred to in the bonds for a deed given for all the lots except those given for three, namely, the plan of 1857 above set forth and a sale plan of lots on Commonwealth Avenue and Marlborough Street, recorded November 5, 1860, Book 788, p. 159, which apparently differs from the plan of 1857 in showing the division of the land into lots. The reference to these plans was a part of the printed form of bond used for Back Bay lots generally. In case of the other three lots (not including however either of the two here in question) the second of the above plans was not referred to, and the plan showing the square here in question laid out as provided in St. 1861, c. 183, was referred to as well as the plan of 1857.

In the deeds of sixteen of the lots on Boylston Street the only plan referred to is the plan of 1857; in the other six the other plan set forth in this opinion also is referred to, showing the square in question laid out as provided by St. 1861, c. 183. In the case of Newbury Street the deeds of twelve lots refer to the 1857 plan only, while both plans printed with this opinion are referred to in the deeds of the other ten lots, including the lots now owned by the plaintiffs.

All the forty-six surrounding lots now are built upon. The buildings on Boylston Street are occupied "by the Young Men's Christian Association and for sundry mercantile uses, by the Hotel Brunswick, and by four dwelling houses used for residences"; the lots on Clarendon Street by apartment houses, the one on Boylston Street having "stores beneath"; those on Berkeley Street by a private apartment house and by an apartment and mercantile building; and those on Newbury Street as follows: corner of Newbury and Berkeley Streets, by a church; the next seven, by dwelling houses used as residences; the next, by a club house; the next, number 85, by a doctor's office and lodging house (which the owner "intends within a few months to occupy . . . again for a residence as well as for his office, as formerly"); the next, by a lodging house; the next five, by residences (in the last of which the owner also "carries on her business as a dressmaker and lets rooms for doctors' offices"); the next, by a lodging house; and on the other corner is the rectory of Trinity Church.



The report of the joint standing committee on education, of the Legislature of 1861, referred to above is as follows:

"The joint Standing Committee on Education to whom was referred the memorial of the Associated Institutions of Science & Arts asking for a Charter for the Massachusetts Institute of Technology, & petitioning for a grant of Back-bay lands in a continuous space, for the uses respectively of said Institute, of the Boston Society of Natural History, & of the Massachusetts Horticultural Society, have considered the same, & respectfully Report as follows:

"The memorialists, representing various associations devoted to Manufactures, the Mechanic Arts, Commerce, Agriculture, Natural Science & Public Education, have had repeated hearings before the Committee, in which they have presented orally & by printed documents a full & comprehensive account of the objects & plans of the before-mentioned institutions as bearing on the material & educational interests of the Commonwealth & have submitted a variety of evidence to illustrate the effect of the proposed grant in augmenting the value of the adjacent lands.

"Looking to all these considerations the memorialists urge that the Institutions in question are doubly entitled to the Legislative co-operation; first from the great benefits which they are calculated to confer on the education & industry of the State & secondly from the circumstance that these valuable results will be secured either wholly without charge upon the treasury of the Commonwealth or by an expenditure quite insignificant in comparison with the benefits attained.

"As regards the petition for a Charter for the Mass: Institute of Technology empowering it to carry into effect the plan of a Society of Arts, a Museum of Arts & a School of Industrial Science, your committee believe the objects of the Institute to be of the highest moment to the material & educational progress of the State, & are moreover satisfied of the sincere purpose & ability of those concerned in the enterprise to carry it into successful operation. They therefore recommend that the Charter prayed for be granted.

"In relation to the assignment of Back-bay lands for which the Memorialists pray, your committee would state that the



petitioners referring to the plan of the territory adopted by the commissioners in 1857 ask the State to set apart and assign to the use of the Boston Soc: of Natural History & the Mass: Institute of Technology the first section of land lying west of Berkeley & between Newbury & Boylston streets extending to Clarendon street, the former Society to occupy about one third & the latter the remaining two thirds of this section. They further ask that the next section of land lying west of Clarendon street in the same range be set apart for the use of the Horticultural Society for ornamental planting & for the erection hereafter of structures suited to the wants of the Society & to the decoration of the grounds.

"Your committee need not enter into details relating to the organization, objects & future purposes of these several institutions; especially as the printed documents prepared with the view of giving full information on these subjects have been for some time in the hands of the Legislature. Restricting ourselves to a few prominent statements in this connection, we would briefly mention certain facts & views which the memorialists urge as entitling these societies respectively to the countenance & assistance of the State.

"Referring first to the Boston Society of Natural History, it appears that this Institution now in existence more than thirty years, has been greatly instrumental in creating & extending a taste for scientific studies & researches throughout the community, that it has made valuable contributions to natural science especially as regards the Geology & Natural History of the State, that it is yearly furnishing additions of acknowledged value to scientific literature by its published journal & proceedings, that it has accumulated a rich & varied collection of objects from the mineral & organic worlds & a library of more than 5000 volumes embracing works of great value for scientific reference & that its museum freely opened to the public once a week is largely visited by teachers & their schools & is recognized as an important means of general instruction. Your committee are further informed that in these efforts to advance the natural sciences & the cause of popular education the Society, with the exception of a grant of 1500 dollars spread over five years, has never asked or received pecuniary aid from the State, but has



been dependent wholly on the enthusiasm of its members & the occasional munificence of individuals.

"The memorialists represent in behalf of this Society that the present building in Mason street is quite too small for their rapidly increasing collections, besides being otherwise unfit for the purposes for which it is used, & they urge that by the erection of an ample structure specially adapted for their objects they will be able to make their labours & instructions more extensively useful to the public at the same time that they secure for themselves a more efficient equipment for those researches by which they may enlarge the boundaries of knowledge. It is moreover represented as a part of their plan, in the event of the success of their present petition, to carry out a system of lectures provided for in their constitution, so as to offer to teachers of the common schools & others seeking such knowledge stated instructions in subjects connected with Natural History.

"In reference to the Institute of Technology your committee have been furnished with full information through the oral statements of the Memorialists & the printed documents already alluded to, in which are set forth the objects & plan of the Institute & the history of the steps thus far taken in its organization.

"As regards the public benefits to be anticipated from it, the Memorialists represent, that such an Institution in its threefold character of a Society of Arts, a Museum of Arts & a School of Industrial Science would be largely conducive to the progress of the Industrial arts & sciences throughout the Commonwealth, & while thus adding to the material wealth of the State, would form a supplement to our educational system of great importance in its influence upon the intelligence & morality of the Community & especially of the industrial classes.

"They urge that in the existing competitions of manufacturing, commercial, & agricultural pursuits such a special training in practical science has become indispensable if we would hope to maintain a prosperous career amid the busy enterprises & inventions of the leading European nations.

"They cite in favour of the plan the example of England, France, & other states eminent for their progress in industry



& applied science, & argue from the general spread of elementary knowledge among ourselves & from the peculiarly practical genius of our people, that we are most favourably placed for reaping the advantages of such an Institution & for deriving the richest profits from its teachings as applied in the fields of commerce & the arts.

“ Looking to the educational bearings of their plan the memorialists urge the great value to the public of each of the three departments of the Institute. They represent that the Society of Arts will be the means of evolving and stimulating the already skilled & cultivated practical talent of the State ; that the Museum of Arts will offer a large treasure of knowledge for the instruction of the general public & for the guidance of all who are devoted to practical science & industrial pursuits, & that the School of Industrial Science while providing a systematic training in the applied sciences & arts of design for its regular students, will open the instructions of ample lecture rooms to the large class of Artisans, Merchants & others seeking for such teachings in practical science as they can acquire in the intervals of labour & without methodical study. In this connection they dwell particularly on the fact that the Institute will fill an important gap in the present educational plans of the Commonwealth, by supplying the industrial classes with the knowledge & training of which they are specially in need & which could not be effectually provided in any of the existing institutions of the State.

“ They also urge that the facilities for the acquisition of practical science thus provided by the Institute being of a nature to attract large numbers of teachers to the museums & lecture-rooms, will conduce to more thorough practical teaching in the common schools, & they add that it is proposed to have a certain number of lectures every year specially arranged for the benefit of persons of this class.

“ In evidence of its connection with the industrial and educational progress of the State at large, the Memorialists further represent that, the Institute as thus far organized embraces in its list of more than two hundred members persons from different sections of the Commonwealth & belonging to almost all the active & professional pursuits ; & they state that it is



contemplated in the plan of the Institute to encourage the formation of local Societies of Arts in the different towns of the Commonwealth, whose correspondence & interchange with the central Institution in Boston may carry the working activities of the latter into every part of the State at the same time that they help to enrich its museums & add to the practical efficiency of all its departments.

“ In regard to that portion of the petition of the memorialists which relates to the application of the Horticultural Society for the adjoining westerly Square, the Committee unanimously came to the conclusion that there was no immediate urgency in their case, & as there is a doubt existing in some minds as to the propriety of making the grant, it was deemed advisable to dismiss this branch of the petition & leave it to future developments for Legislative action should it be desired.

“ Your committee have made careful enquiry in relation to the ability & readiness of the several societies to occupy & improve the proposed grant of land & otherwise to carry into effect the purposes professed by them. They learn that the Boston Soc: of Nat: History has lately received an important addition to its resources, which with its previous means will place it in a condition to erect a commodious & handsome edifice for its accommodation on the grounds in question, & that the Society will be in readiness to begin building as soon as it shall be authorized to occupy the land.

“ In regard to the Institute of Technology the Memorialists represent that it is proposed by this Society, as a guarantee to the State, to agree to raise a sum of 100,000 dollars for their appropriate purposes before entering on the granted land. They further state that they have already received earnest intimations, conditional on this grant, of a munificent endowment to be devoted to the school of Industrial Science, & of a liberal appropriation from a different quarter for building purposes; and they express the fullest confidence in their ability to secure adequate means for entering effectively on the educational & other plans of the Institute.

“ After a full consideration of what is above briefly reported as to the character & prospective influence of the several institutions represented in the memorial & as to their ability to carry



out the purposes professed by them, your committee have been satisfied of the substantial basis of their plans & of the great benefits to be conferred by them on the industry & education of the Commonwealth.

“Before however making up a conclusive opinion on the petition of the Memorialists they have felt it their duty to enquire carefully into the hearing of the proposed grant in a financial point of view, & have sought to ascertain to what extent, if any, this grant would operate to diminish the receipts otherwise accruing from these lands to the school fund of the State.

“According to the plan of the Memorialists, sufficient space is to be reserved to leave wide openings around the buildings of the societies, while the form of the proposed reservation is such as to make the aggregate of lots fronting its sides equal to the area of the reservation. Common experience shows that such open ornamental grounds surrounding the buildings, together with the attractive exterior of the latter, could not fail to increase the value of the adjacent lands, & to this extent would reimburse the treasury for the space withdrawn from sale. As regards the amount of this enhancing influence your committee have been furnished by the Memorialists with a large array of facts derived from the sales of lands on the Back bay & other open parts of the city, going to show that improvements of the kind contemplated have been found in every case not only to hasten the sale & occupation of the adjacent lands, but to add very largely to their market value, making the net proceeds of the adjacent lands in most cases as great or even greater than the value of the total area supposing no such reservation to have been made. These results moreover have been reinforced by the statements of experienced Architects, Builders & dealers in real estate in Boston, as well as by the testimony of the Superintendents of city lands in Boston & in New York.

“Whatever opinions may be entertained as to the extent of this enhancing influence in the case of the present proposed grant, your committee are unanimous in the conviction that it would reach such an amount as to leave but a slight deficiency in the entire proceeds of the lands if indeed it should not completely cover the value of the reserved tract & thus secure the treasury entirely against loss.



"But your committee are unwilling to rest their conclusions as to the prayer of the petitioners wholly or even chiefly on the ground here presented. They see in the plans & purposes set forth by the memorialists the assurance of great & increasing benefits to the general education as well as the industry of the Community, & regarding such aims as eminently entitled to the favour of the State they believe that the public advantages contemplated in the plans proposed would be wisely purchased even by a share of the direct bounty of the Commonwealth.

"Such however is not the kind of aid craved by the petitioners. The land for the use of which they apply has already indirectly & in part at least been dedicated to public education. They do not propose to withdraw it from this Object, but on the contrary to give it a new & vastly increased value for educational purposes. The character & extent of their plans as well as their formal assurances to this effect show that in carrying out their objects they will bring together *in the service of education* on the proposed grant, a wealth of funds & of all the machinery of practical instruction far exceeding the entire money value of the land, & compared with which the dividend accruing from it to the school fund when applied in the same service would be utterly insignificant.

"In view of these facts & considerations your Committee are in favour of granting the prayer of the Memorialists to the extent & according to the conditions of the following Bill —

" W. Battles  
M. Brimmer  
Saml L. Ward  
John Q. Hammond  
James W. Clark  
Samuel Osgood."

St. 1903, c. 438, provides as follows:

"Section 1. All the proprietary right, title and interest by way of reversion, right of re-entry or otherwise, remaining to the Commonwealth in that tract of land, being the westerly two thirds of the square between Newbury, Boylston, Berkeley and Clarendon streets on the Back Bay in the city of Boston, which the Massachusetts Institute of Technology is authorized by chapter one hundred and eighty-three of the acts of the year



eighteen hundred and sixty-one to hold and improve, is hereby released to the said Massachusetts Institute of Technology, its successors and assigns.

"Section 2. Subject to the rights, if any, of other parties and to the restrictions hereinafter set forth, the Massachusetts Institute of Technology, or its grantees, may erect upon all or any part of said premises, buildings conforming to the building laws of the city of Boston ; but no building erected on the above described premises shall be used for a stable or for any mechanical or manufacturing purposes." [Here follow provisions as to set back and projections.]

The case was argued at the bar in December, 1904, before *Morton, Barker, Hammond, & Loring, JJ.*, and afterwards was submitted on briefs to all the justices except *Knowlton, C. J.*, who, being a member of the corporation of the Massachusetts Institute of Technology, did not sit in the case.

*John Chipman Gray & E. L. Rand*, for the plaintiffs.

*G. Putnam & W. L. Putnam*, for the defendant.

LORING, J. The contest here is on the application of well settled principles of law to new surroundings.

Counsel for both parties agree that it is not necessary to decide whether the effect of St. 1861, c. 183, was to convey to the two societies the fee in the square in question or only certain rights of occupation, the fee being retained in the Commonwealth. If we speak of the grant as one or the other, it will be for convenience only and not as expressing any opinion on this point.

We agree with the counsel for the defendant in their contention that if St. 1861, c. 183, was not intended to give to persons buying the surrounding lots under it the right here claimed by the plaintiffs, they cannot make out a case because of the form given to the transaction by the officers of the Commonwealth. If St. 1861, c. 183, was not intended to give such a right, such acts of these officers would not bind the Commonwealth on the principle lately enforced in *Wormstead v. Lynn*, 184 Mass. 425.

In construing this act the first fact and the most important consideration is that the grant to these two societies was not to cost the Commonwealth a penny, and that this was to be



effected by dealing with the square granted to the societies in such a way as so to enhance the value of the surrounding lots that they would yield as much as or more than the aggregate value the two had under the conditions prevailing before St. 1861, c. 183, was enacted. It is perhaps of some interest that this scheme was suggested to the Commonwealth by the petitioners for these grants, including among them the petitioners for the incorporation of the defendant.

It is stated in the report of the committee of the Legislature to whom these petitions for a grant of land were referred: "According to the plan of the Memorialists, sufficient space is to be reserved to leave wide openings around the buildings of the societies." And again: "Common experience shows that such open ornamental grounds surrounding the buildings, together with the attractive exterior of the latter, could not fail to increase the value of the adjacent lands, and to this extent would reimburse the treasury for the space withdrawn from sale. As regards the amount of this enhancing influence your committee have been furnished by the Memorialists with a large array of facts derived from the sales of lands on the Back Bay and other open parts of the city, going to show that improvements of the kind contemplated have been found in every case not only to hasten the sale and occupation of the adjacent lands, but to add very largely to their market value, making the net proceeds of the adjacent lands in most cases as great or even greater than the value of the total area supposing no such reservation to have been made."

St. 1861, c. 183, adopted to carry into effect this scheme of the "memorialists," (including the defendant Institute,) provided (first) that the square in question "shall be reserved from sale forever"; (second) "and kept as an open space, or for the use of" the two societies; and (third) "The above named societies shall not cover with their buildings more than one-third of the area granted to them respectively." The plaintiffs contend that these declarations were addressed to the purchasers of the surrounding lots as the basis on which those lots were to be sold, and were made for the benefit of such purchasers; and that having bought on the faith of them these purchasers are entitled to have them specifically enforced.



The defendant on the contrary insists that on a fair construction of the provisions of the act the Legislature intended to keep and did keep the control of all restrictions in its own hands, that the value of the surrounding lots was to be enhanced by the square in question being physically laid out before they were sold, and that the square was to continue in that condition so long as the Commonwealth, having regard to the interests of all concerned, should think it ought so to continue and no longer; that St. 1903, c. 438, was an exercise of the control so reserved, and brought to an end as of right the advantages for which the purchasers of the surrounding lots paid an enhanced price.

When the defendant contends that in St. 1861, c. 183, the Legislature kept the control of the whole situation in its own hands, it relies on the fact that, having regard to the words "further conditions" in § 6, what are called "stipulations" in § 4 are really conditions, and being conditions the subject matters covered by them are matters between the Commonwealth and the grantees, and between them alone.

Were that the whole story the result would not necessarily follow. The fact that a provision in a deed is put in the form of a condition and in no other form, even when coupled with an express statement that the "non-fulfilment or breach . . . shall work a forfeiture of the estate hereby conveyed, and reinvest the same in the grantor," is not decisive against its operating as an equitable restriction in addition to its operating as a common law condition. That was decided in *Hopkins v. Smith*, 162 Mass. 444, and is laid down in the recent case of *Welch v. Austin*, 187 Mass. 256, 258. The same principle would govern in case of a grant made by act of the Legislature.

The doctrine of *Hopkins v. Smith* is that in spite of the parties to a deed having put the thing agreed upon in the form of a common law condition and a common law condition only, the question whether it does not operate also as an equitable restriction is one of intention. The fact that the thing agreed upon has been put in the form of a common law condition, and in that form alone, is of itself a matter to be taken into consideration in arriving at the intention of the parties. But that fact has no greater or further effect. The opposite results severally reached in the cases of *Peck v. Conway*, 119 Mass. 546, and *Clapp v.*



*Wilder*, 176 Mass. 382, are examples of the application of this rule.

The cases of *Episcopal City Mission v. Appleton*, 117 Mass. 326, and *Skinner v. Shepard*, 180 Mass. 180, (as to which see *Welch v. Austin*, 187 Mass. 256, 259,) would raise an additional difficulty in construing the matters covered by § 4\* to be equitable restrictions as well as conditions, had the plaintiffs put their case on the ground that it was by force of the provisions of that section that they were entitled to an equitable restriction. That additional difficulty consists in the fact that § 4 deals alike with matters with which the purchasers of surrounding lots have nothing to do, and with inclosing, adorning and cultivating the open ground around its building and thereafter keeping said grounds and building in a sightly condition. We refer to the "stipulation" that "persons from all parts of the Commonwealth shall be alike eligible as members of said institute, or as pupils for its instruction; and its museum or conservatory of arts, at all reasonable times, and under reasonable regulations, shall be open to the public." But as we shall see, § 4 and its provisions are not what the plaintiffs rely upon.

We come then to the question of the true construction of the act, St. 1861, c. 183.

In the first place, it is provided (and this provision is in § 3 and is not one of the "stipulations" of § 4 nor one of the "fur-

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\* "Section 4. If at any time within one year after the passage of this act, the said Institute of Technology shall furnish satisfactory evidence to the governor and council that it is duly organized under the aforesaid charter, and has funds subscribed, or otherwise guaranteed, for the prosecution of its objects, to an amount at least of one hundred thousand dollars, it shall be entitled to a perpetual right to hold, occupy and control, for the purposes herein before mentioned, the westerly portion of said second square, to the extent of two thirds parts thereof, free of rent or charge by the Commonwealth, subject nevertheless, to the following stipulations, namely: persons from all parts of the Commonwealth shall be alike eligible as members of said institute, or as pupils for its instruction; and its museum or conservatory of arts, at all reasonable times, and under reasonable regulations, shall be open to the public; and within two years from the time when said land is placed at its disposal for occupation, filled and graded, said institute shall erect and complete a building suitable to its said purposes, appropriately inclose, adorn and cultivate the open ground around said building, and shall thereafter keep said grounds and building in a sightly condition."



ther conditions" of § 6) that the square in question "shall be reserved from sale forever."

It is true that the only thing here complained of is a threat by the defendant Institute to build over more than one third of the area granted to it. But the right to build over more than that area and the right to sell the whole area to others to be built over by them is treated in St. 1861, c. 183, as one and indivisible, and no distinction is made in St. 1903, c. 488, between the right to build over the whole area and the right to sell the whole area to others to be built over by them. The two rights alike are granted to the defendant Institute by the act of 1903. The true construction of St. 1861, c. 183, cannot be determined without considering the validity of the provision of St. 1903, c. 488, which permits the sale by the defendant Institute of the whole area to others, to be built over by them.

In construing St. 1861, c. 183, we start first with a declaration that this square was to "be reserved from sale forever." And having in mind the purpose for which St. 1861, c. 183, was enacted, we are of opinion that this was a declaration addressed to future purchasers of surrounding lots, to induce them to pay for those surrounding lots more than they otherwise would pay for them.

We next come to the declaration that the square which is to "be reserved from sale forever" is to be "kept as an open space or for the use of" the two societies, and that "the above named societies shall not cover with their buildings more than one-third of the area granted to them respectively." These provisions state the details of what is to be done with this square which is to "be reserved from sale forever," and like that declaration are addressed to future purchasers of surrounding lots. Being details the duration of them is fixed by that of the main provision of which they are details, unless there is something to control that result.

It is of importance that these provisions are not found among the "stipulations" of § 4, nor among the "further conditions" of § 6,\* but are in separate sections (§§ 3 and 7) which are not

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\* "Section 6. The rights and privileges given in the last two sections, are granted subject to these further conditions following, namely: All buildings whatsoever, which may be erected by either of the herein named in-



put directly or indirectly in the form of conditions. The case now before us therefore is not such an extreme one as *Hopkins v. Smith*, where there was no provision outside of or in addition to a condition coupled with an express defeasance and right of re-entry.

In the case at bar the broad principles on which the surrounding lots are to be sold are stated in sections (§§ 3 and 7) addressed to the purchasers of them; and these are not put in the form of conditions. In addition we have §§ 4 and 6 which are put in the form of conditions. These sections deal (*inter alia*) with the machinery adopted for carrying into effect the details of the broad principles stated in §§ 3 and 7.

Apparently the Legislature thought that the best results could not be secured to the purchasers of surrounding lots unless some one person or body could act for them all in matters of detail, and for that reason it entrusted the matter of dealing with the details to the Governor and Council. Apparently the Legislature further thought that the best way of enforcing compliance with directions as to details so made was to give to the Governor and Council a right of re-entry on non-compliance with the directions adopted by them; and it gave such a right of re-entry. But that did not interfere with the declarations (on which these surrounding lots were to be sold) constituting a right in the purchasers of them, namely, that this square was to "be reserved from sale forever," and, if not used as an open space, it was not to be covered by buildings to an extent greater than one third of its area. The result is that the design of the buildings to be erected, the laying out of the grounds and the proper main-

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stitutions upon any portion of said second square, shall be designed and completed, the grounds surrounding said buildings inclosed, laid out and ornamented, and the said buildings and grounds kept and maintained in a manner satisfactory to the governor and council; and in case either of the said institutions shall, after due notice given, neglect to comply with the requirements of this section, or fail to use its portion of said square, or at any time appropriate said portion, or any part thereof, to any purpose or use foreign to its legitimate objects, then the right of said delinquent institution to the use, occupation or control of its portion of said square shall cease, and the Commonwealth, by its proper officers and agents, shall have the right forthwith to enter and take possession of the portion of land so forfeited."



tenance of both are matters left to the discretion of the Governor and Council. But the broad principles were not left to them. Under St. 1861, c. 183, the Governor and Council were authorized to approve such a building as they saw fit without regard to what might be thought of it by others; they might give their approval to what might be thought by others to be the laying out of the grounds in a way injurious to the surrounding residences, and they might allow the grounds to fall into what might be thought by others to be a deleterious state of maintenance. On these matters of detail their decision, honestly exercised, is final. But they have not now and never had jurisdiction to abridge the rights of the purchasers of surrounding lots (first) to have the square "reserved from sale forever," and, (second,) in case it is not used as an open space, to have the buildings of the two societies not cover "more than one-third of the area granted to them respectively." In our opinion such was the intention of the Legislature in enacting St. 1861, c. 183, and that is what the Legislature provided by that act.

It is true that St. 1863, c. 226, repealed §§ 8 and 9 of St. 1861, c. 183, requiring the two societies to make good the deficit in case the amount realized from the sale of the surrounding lots under St. 1861, c. 183, did not equal the value of those lots plus the value of the square here in question before St. 1861, c. 183, was enacted; and that all the lots (with the exception of those on Berkeley Street sold before the enactment of St. 1861, c. 183) were sold after the repealing act of 1863. But the repeal of these sections was not intended to change the scope of the act (St. 1861, c. 183). It was intended to release the societies from a burden which was assumed and rightly assumed to have ceased to exist. As was said by the commissioners in their report of 1863, when speaking of the sales made in the previous year, the "policy of this repeal was justified by the sale" on account of the great rise above the appraised values, — a rise which was created by the scheme of St. 1861, c. 183, in favor of the surrounding lots.

We are of opinion that on the facts stated the plaintiffs have sustained the burden of proving that the surrounding lots generally and the lots now owned by them in particular, were sold and bought under St. 1861, c. 183; and that they became en-



titled by such purchase to the benefits granted to them by that act, including the right to have the buildings of the defendant corporation confined to an area not exceeding one third of the land assigned to it by St. 1861, c. 183.

Although the Commonwealth is a sovereign State, it can no more change the grant thus made than can an individual. That has been the law, at least since *Dartmouth College v. Woodward*, 4 Wheat. 518.

We see nothing in the agreement of the parties \* that should disentitle the plaintiffs from having this agreement specifically enforced. What that agreement amounts to is that the square in question would have a greater market value than it has if the surrounding lots had not been sold on the terms on which they were sold. The plaintiffs have a right to use their property as they please, even if that property would have a greater value if devoted to another use. The facts agreed to do not bring the case within the doctrine of *Jackson v. Stevenson*, 156 Mass. 496,

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\* The agreement referred to is contained in the following paragraphs of the agreed facts:

"15. The value of the neighboring land on Boylston street has, since 1861, multiplied several times. The market value of the westerly two thirds of the square in question, if it could be covered and improved by buildings conforming to the restrictive provisions imposed by acts of 1903, c. 438, would be many hundred thousand dollars more than its market value if only one third of its area can be legally covered by buildings.

"16. The defendant contends that the market value of the plaintiff's land would be increased by such erection. This the plaintiff denies, and claims its value would be decreased thereby. It is agreed, however, that the erection of such buildings would cause appreciable damage to the plaintiff's building as a dwelling house, the purpose for which it was designed and is still used; but that the defendant might put certain structures on certain parts of the two thirds of its land now unused without other damage to the plaintiff than such technical damage as the law would imply.

"17. The Institute of Technology has outgrown its present quarters and must add to them by either building in the neighborhood, by building on the unused two thirds of its part of the square, or by moving to cheaper land in the suburbs. It has not at present means sufficient to buy land in the neighborhood and maintain its efficiency. It cannot afford to move unless it can sell the whole of its two thirds of the square for improvement, or obtain additional gifts. Its present buildings on the square cost upwards of \$500,000, and at least one of them, the Walker building, is not adapted for other purposes than those of a scientific school, and both would be useless for the purposes of the Institute if it moved into the suburbs."



nor within the concluding paragraph of the opinion in *Parker v. Nightingale*, 6 Allen, 341, 349.

The plaintiffs are severally entitled to a decree with costs enjoining the defendant from proceeding with the erection of any building or buildings covering more than one third of the area assigned to it by St. 1861, c. 183.

*So ordered.*

Justices MORTON and HAMMOND dissent. They think that the square occupied in part by the defendant is not subject to any equitable or other restrictions in favor of the plaintiffs or surrounding lot owners, and that the bills should be dismissed.



HASTINGS LUMBER COMPANY *vs.* ISABEL A. EDWARDS  
& others, executors.

Suffolk. January 13, 1905. — September 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Contract. Corporation.*

The directors of a corporation, in the absence of a statute, a by-law or a vote of the corporation authorizing it, have no power by vote to release one of the subscribers for the stock of the corporation from his obligation to take and pay for a part of the shares for which he has subscribed.

By the law of the State of Maine one of the subscribers for the stock of a corporation who signs an agreement to take and pay for a certain number of its shares, if all the stock is subscribed for and the corporation is formed, and all the conditions of the subscription are performed, is bound to take and pay for all the shares he has subscribed for, whether the other signers of the subscription paper have paid for their shares or not.

CONTRACT, by a corporation organized under the laws of the State of Maine, against the executors under the will of Frank Aldrich, late of Cambridge, for the amount of two calls made on the defendants after the death of their intestate, one on July 25, 1902, for \$3,750, and the other on October 3, 1902, for \$2,500, as the last two instalments of stock of the plaintiff which had been subscribed for by the defendants' testator at the formation



of the plaintiff as a corporation in January, 1898. Writ in the Supreme Judicial Court dated November 22, 1902.

The case was sent to an auditor, who reported in favor of the plaintiff. At the hearing of the case before *Braley, J.*, without a jury, the single ground relied upon by the defendants was the alleged invalidity of the two calls on the ground that one Garret Schenck, another subscriber for the stock of the plaintiff, had by a vote of the directors been omitted from the list of subscribers and his subscription had not been enforced.

The justice made a finding of facts, and at the request of the parties reserved the case on the questions of law raised, for the full court to determine whether on the facts found by him judgment should be entered for the plaintiff or for the defendants.

The contract of subscription for the stock of the plaintiff, which was signed by the defendants' testator and by Schenck and all the other subscribers, was as follows:

"The undersigned hereby agree each with the other and with the corporation hereafter to be organized or chartered for the purposes hereinafter designated, to subscribe, take and pay for, at par, the number of shares in the capital stock of such corporation, of the par value of One Hundred Dollars each, set against their respective names.

"The Capital Stock of said corporation shall be Three Hundred Thousand Dollars (\$300,000.00), divided into Three Thousand (3000) Shares of the par value of One Hundred Dollars (\$100.00) each.

"Said corporation shall be formed for the purpose of acquiring and operating the property of the Wild River Lumber Company.

"The aforesaid subscriptions are made upon the following conditions, viz.:

"(1) That a sale of the property of the Rumford Falls Paper Company is made to some other corporation.

"(2) That the whole amount of the aforesaid Capital Stock is subscribed for.

"The first payment on account of said subscription shall be 20 % of the amount of the stock subscribed respectively, and shall be payable when the title of said property has been approved, and a proper conveyance made, and the consummation



of the agreement relative to the purchase thereof; and the balance of said subscription shall be payable when and as fast as may be necessary to comply with the terms of such purchase, and for the purpose of operating upon said property, if such course is decided upon after the organization of such corporation."

All the shares were subscribed for, Aldrich and Schenck each subscribing for two hundred and fifty; and it appeared that the other conditions set forth in the contract, the sale of the Rumford Falls property, the purchase, the approval of the title and the conveyance of the Wild River Lumber Company's property, were performed.

The president of the plaintiff was Daniel F. Emery, Jr. The letter of the president and the transaction of the assignment referred to in the opinion were as follows:

"Portland, Maine, Jan. 20th, 1899.

"Frank Squier, Esq.,

"New York City, N. Y.

"Dear Sir: — Yours of the 19th inst. is at hand, in regard to Mr. Schenck's note. Mr. Schenck holds 60 shares of stock, for which he gave his note, on four months for \$6000.00 agreeing to send us a check for \$100. for the four months' interest to make his payment on the same basis as the other subscribers, that is, cash, March 5th, 1898, so that he owes us \$6100.00 and interest on the note from July 5th to date, amounting to a total of \$6280.00 which, if he will pay us through you, I would, and I think the other subscribers would be in favor of freeing him from his liability on the subscription list, and if necessary, and the stockholders wish, I will assume personally the balance of his subscription, which would be \$19,000.00.

"On his payment to you of \$6280.00 please surrender the note, and you and he can make any trade you see fit for the 60 shares certificate that he holds. I enclose the note endorsed over to you, which, if not paid, please return to us. If he sells you his stock, please send it in promptly and we will issue a new certificate therefor. It would be well for you to have him request the Hastings Lumber Co. in writing, to transfer the balance of his subscription (amounting to \$19,000.) to me, so that we can have it on file.

"Yours very truly,

"Daniel F. Emery, Jr."



" March 17, 1899.

"Hastings Lumber Company,  
"Portland, Me.

"Gentlemen: Please transfer the balance of my subscription for stock in the Hastings Lumber Company to Perkins, Goodwin & Company of New York, and oblige,

"Yours truly,  
"Garret Schenck."

" March 22, 1899.

"Hastings Lumber Company,  
"Portland, Me.

"Gentlemen: Please transfer the balance of above subscription to stock in Hastings Lumber Company to Daniel F. Emery, Jr., or to treasury stock, as you may see fit.

"Perkins, Goodwin & Company."

The case was submitted on briefs at the sitting of the court in January, 1905, and afterwards was submitted on briefs to all the justices.

*E. B. Gibbs*, for the plaintiff.

*J. Willard*, for the defendants.

BRALEY, J. The plaintiff, a foreign corporation organized and chartered under the laws of the State of Maine, brings this action on a written agreement signed among others by the defendants' testator, who subscribed for two hundred and fifty shares of its capital stock. After the contract took effect there was a full compliance with all precedent conditions upon which payment depended, while one hundred and eighty-seven and one half shares of his subscription have been taken and paid for by the testator, or since his death by his executors, for which certificates have been issued. Payment for these shares was made from time to time as called for by the directors under the following provision. "The first payment on account of said subscription shall be 20 % of the amount of the stock subscribed respectively, and shall be payable when the title of said property has been approved, and a proper conveyance made, and the consummation of the agreement relative to the purchase thereof; and the balance of said subscription shall be payable when and as fast as may be necessary to comply with the terms of such



purchase, and for the purpose of operating upon said property, if such course is decided upon after the organization of such corporation."

Among the subscribers the name of Garret Schenck appears, who after agreeing to take and pay for two hundred and fifty shares finally paid for sixty, and then endeavored to transfer his obligation or "the balance of my subscription for stock" to strangers to the agreement.

The by-laws of the corporation provide that "the board of directors shall have general supervision and control of the business of the corporation, and shall have full power to take all such steps as in their judgment shall be for the best interests of the company, . . . they may issue and dispose of such part of the treasury stock as they deem for the best interests of the corporation."

Acting under this authority it appears from the records of the board, that after the attempt to transfer had been undertaken, at a meeting held on April 19, 1900, and when making an assessment upon the subscribers, they voted to omit "the subscription of Garret Schenck." It is to be inferred that no notice of this call was sent to him. While the vote to omit was limited in terms to the assessment then levied, and no vote of a similar exemption appears in making the remaining assessments required to complete the payment of the full capital, yet the actual omission of his stock, especially from the last two calls that are the subject of this action, is the ground on which the defendants refuse to pay upon those calls. For they contend that such omission rendered each of these assessments void, and uncollectible from the other subscribers.

The wrongful conduct of which they really complain is, that successfully to float the enterprise all the capital was to be paid in as called for, and because this was to be accomplished by payments made in instalments it would be inequitable for the corporation to require the other stockholders to risk their money and to contribute while the subscription of Schenck was treated as exempt.

It is conceded by the parties that the action is brought properly in the name of the corporation, and their respective rights are to be determined by the laws of its domicil. *Penobscot f*



*Kennebec Railroad v. Bartlett*, 12 Gray, 244. *Callender, Mo-Auslan & Troup Co. v. Flint*, 187 Mass. 104.

In the consideration of the case the distinction is not to be forgotten that the action is not to recover an unpaid assessment levied upon the capital stock, but is brought upon the agreement "to take and pay for" the shares treated as a contract at common law to recover the amount remaining due of the testator's subscription. *Worcester Turnpike v. Willard*, 5 Mass. 80, 86. *Salem Mill Dam v. Ropes*, 6 Pick. 23. *City Hotel v. Dickinson*, 6 Gray, 586. *Boston, Barre & Gardner Railroad v. Wellington*, 118 Mass. 79, 87. *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, 596. *Belfast & Moosehead Lake Railway v. Moore*, 60 Maine, 561. *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 300.

No questions concerning the cumulative statutory remedy providing for the forfeiture of stock by sale for unpaid assessments, or the maintenance of an action at law to recover for a balance remaining after such sale, or the liability of a transferee for assessments after an assignment to him of shares by an original subscriber are involved. See *Mechanics' Foundry & Machine Co. v. Hall*, 121 Mass. 272; *Lewey's Island Railroad v. Bolton*, 48 Maine, 451; *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 354; *Brigham v. Mead*, 10 Allen, 245.

The transaction shown by the assignment, and the letter of the president of the company, set forth in the report, presumably was the reason for the vote of omission. But it is clear that these papers, with the action taken, cannot be treated as transferring the title of the stock to nor its acceptance by the plaintiff.

As the entire capital was fully taken, and none of the shares appear to have been forfeited, there was no treasury stock the directors could issue. Furthermore the by-law was insufficient to confer upon them any power, at the request of a subscriber, to convert shares for which he had subscribed, but did not wish to take and pay for, into such stock, and thus relieve him from his subscription. If there had been a formal agreement between him and the directors that the number of his shares should be reduced, that he should take only those he already had paid for,



and surrender the balance to the corporation, while his original subscription should be cancelled, such an arrangement in the absence of a statute, by-law or vote of the corporation expressly permitting it, but not appearing in this case, would have been void. It neither would have relieved him, nor worked a discharge of the testator's liability. *Penobscot & Kennebec Railroad v. Dunn*, 89 Maine, 587. *White Mountains Railroad v. Eastman*, 84 N. H. 124. *Meyer v. Blair*, 109 N. Y. 600. *Addison's case*, L. R. 5 Ch. 294. *In re Esparto Trading Co.* 12 Ch. D. 191.

And while it may be inferred that it might have been the intention of the president, and possibly of a part of the directors, to treat the remaining one hundred and ninety shares as treasury stock, this purpose was not accomplished, and the corporation so far never has dealt with the proposition, or accepted a surrender of his stock, or relieved Schenck from his original promise.

The judgment of the board that the payments were necessary, and that the amount should be fixed as shown by these votes, was within the authority conferred upon them, and where no fraudulent purpose is shown, their action is conclusive upon the subscribers without previous notice. *Glenn v. Marbury*, 145 U. S. 499.

No evidence appears, nor is any claim advanced, that the directors in the exercise of their large discretionary powers in the supervision of the general affairs of the company, or in calling for the payment of subscriptions, acted otherwise than in good faith, and for the general welfare of the company, or that they have shown any intentional partiality between the subscribers. Eventually no subscriber could be held under the agreement for more than the amount of his subscription. As the contract of Schenck was not cancelled or discharged, the mere order of time, and nothing more, when payment should be enforced by appropriate corporate action taken against him would be immaterial.

On recurrence to the contract, it is there stated that every subscriber agrees "to subscribe, take, and pay for, at par, the number of shares . . . of the par value of one hundred dollars each, set against their respective names." This is an express individual promise made by every signer of the subscription



paper, the performance of which is not dependent upon payments by other subscribers. *Boston, Barre & Gardner Railroad v. Wellington*, *Worcester Turnpike v. Willard*, *Salem Mill Dam v. Ropes*, *Belfast & Moosehead Lake Railroad v. Moore*, *ubi supra*. *Northwood Union Shoe Co. v. Pray*, 67 N. H. 485.

Upon reference to the decisions of the Supreme Judicial Court of Maine, where similar contracts have been under consideration, it fully appears that such construction uniformly has been given by that court in all cases where, as in the present case, it has been sought to hold a subscriber to perform his agreement. *Bangor Bridge v. McMahon*, 10 Maine, 478. *South Bay Meadow Dam v. Gray*, 80 Maine, 547. *Kennebec & Portland Railroad v. Kendall*, 81 Maine, 470. *Kennebec & Portland Railroad v. Jarvis*, 84 Maine, 360, 363. *Buckfield Branch Railroad v. Irish*, 89 Maine, 44. *Penobscot Railroad v. Dummer*, 40 Maine, 172, 175. *Belfast & Moosehead Lake Railroad v. Brooks*, 60 Maine, 185, 190. *Belfast & Moosehead Lake Railroad v. Cottrell*, 66 Maine, 185, 190. *Skowhegan & Athens Railroad v. Kinsman*, 77 Maine, 370, 371, 372. *Rockland, Mt. Desert & Sullivan Steamboat Co. v. Sewall*, 78 Maine, 167. See also *Penobscot & Kennebec Railroad v. Bartlett*, 12 Gray, 244.

Thus in the case of *Kennebec & Portland Railroad v. Jarvis*, 84 Maine, 360, 363, it was said by Chief Justice Shepley, when considering a like contract, "The promise is not to pay all 'legal assessments.' It is to pay for the shares as he should be required by a vote of the company, without any reference to assessments or payments to be made on other shares." And this decision is followed in a full opinion by Chief Justice Appleton in *Buckport & Bangor Railroad v. Buck*, 65 Maine, 536, 541. Nor are the cases of *Somerset & Kennebec Railroad v. Cushing*, 45 Maine, 524, and *Pike v. Bangor & Calais Shore Line Railroad*, 68 Maine, 445, on which the defendants rely, in conflict with them.

In these last cases the validity of the assessments under consideration arose under charters that so far as expedient or necessary permitted them to be levied and enforced from time to time only upon all the shares of the corporation. But in neither case did the cause of action declared on rest, or the decision go, upon the basis of an express contract to take and pay for stock.



In accordance with the terms of the report judgment is to be entered in favor of the plaintiff for \$6,250, with interest at the legal rate on \$3,570 of this amount from July 25, 1902, and on the remainder of \$2,500 from October 8, 1902, to the date of entry.

*So ordered.*

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EVELYN DICKINSON (afterwards EDWARD J. MCINTYRE,  
administrator,) vs. CITY OF BOSTON.

Suffolk. January 17, 1905. — September 7, 1905.

Present: KNOWLTON, C. J., MORTON, LATHROP, BARKER, HAMMOND,  
LORING, & BRALEY, JJ.

*Witness, Cross-examination. Evidence, Declarations of deceased persons. Boston.  
Municipal Corporations.*

In an action for personal injuries prosecuted after the death of the plaintiff by the administrator of her estate, to recover at common law for the suffering of the intestate from the time of the accident to the time of her death, where the defendant contends that the intestate during this period was suffering and finally died from pulmonary tuberculosis, it is within the discretion of the presiding judge to exclude on the cross-examination of the mother of the intestate, a witness for the plaintiff, questions put for the purpose of eliciting from her a statement that others of her children had died from pulmonary tuberculosis, especially where the substance of the evidence excluded afterwards is admitted in another form.

In an action against a city, begun as an action for injuries from a defect in a highway, where the plaintiff has died, and the action is prosecuted by her administrator, the declarations of the intestate, narrating the circumstances under which the accident occurred, are none the less admissible under R. L. c. 175, § 66, because they were made after the notice required by R. L. c. 51, § 20, had been given to the city, if they were made before the date of the writ.

On an exception to the admission by a presiding judge of the declarations of a deceased person under R. L. c. 175, § 66, if the bill of exceptions does not state that the judge failed to make inquiry to ascertain the good faith of the declarant before admitting the declarations, such judicial action and a preliminary finding of the good faith of the declarant will be inferred from the admission of the evidence.

Under Prov. St. 1773-74, c. 12, confirmed by St. 1796, c. 69, when Boston was a town, and by St. 1825, c. 8, after it became a city, that city was authorized, but was not required, to maintain lamps to light its streets, and to enact proper ordinances providing for the punishment of persons breaking or damaging the lamps.

No general statutory duty is imposed on cities or towns in this Commonwealth to light their streets for any purpose, and if a city lights its streets as a matter of convenience and safety for those having occasion to use them at night, and by



an ordinance directs its superintendent of lamps to keep and maintain all lamp posts in repair, the superintendent of lamps in the performance of this duty becomes the servant of the city for whose negligence in the maintenance of the posts it is responsible.

**BRALEY, J.** This is an action of tort to recover damages for injuries suffered by the plaintiff's intestate, caused by the fall of a defective lamp post owned by the defendant. Originally the deceased sought to sustain the action under R. L. c. 51, § 18, for injuries received as a traveller upon the highway. But if the lamp post which fell stood in a public way, at the time of the accident she was on her own premises, and this statutory provision was inapplicable. Upon her death, the plaintiff, as administratrix, being admitted to prosecute the suit, by an amendment duly allowed declared in tort at common law for the alleged negligence of the defendant in not keeping and maintaining the lamp post in repair, and allowing it to become defective and unsafe. The plaintiff having obtained a verdict in the Superior Court, the defendant brings the case here on exceptions to the exclusion and admission of certain evidence, and to a refusal to rule that upon all the evidence the action could not be maintained.

No argument has been advanced at the bar, nor is found in the defendant's brief, that if the action could be maintained there was no evidence for the jury of its negligence, or that the deceased was not in the exercise of due care. This leaves for our consideration such matters only as were argued, or appear in the briefs. Before taking up the principal question of liability, the correctness of the rulings relating to evidence may be considered.

The cause of action was for the conscious suffering of the plaintiff's intestate from the time of the accident to her death, and evidence which had a tendency to prove that during this period she was suffering and finally died from an intercurrent disease was admissible. But the attempt of the defendant, for this purpose to elicit on cross-examination from the mother of the deceased, who was a witness for the plaintiff, that others of her children had died from pulmonary tuberculosis, and hence there was a presumption that her daughter also had died from this disease, well may have been deemed in the discretion



of the presiding judge as too remote to be of any probative value, and its exclusion affords no just ground of exception. *Jennings v. Rooney*, 188 Mass. 577. *Perkins v. Rice*, 187 Mass. 28.

Furthermore, whatever benefit might have been derived from an answer to the question later was obtained by the defendant when from one of its medical witnesses uncontroverted evidence of the presence of this disease in the family, and under such circumstances that if infectious the deceased might have contracted it, was admitted. *Morrison v. Lawrence*, 186 Mass. 456.

Under an objection, but without an exception being taken at the time, though subsequently allowed as an exception of the defendant, a witness for the plaintiff, who had acted as counsel for her intestate, was permitted to give evidence of declarations she had made to him before the commencement of the action, whereby she fully narrated the circumstances under which the accident occurred.

It now is urged that as this conversation was held after a notice under R. L. c. 51, § 20, had been served upon the city it is not brought within the provisions of the St. 1898, c. 535, now R. L. c. 175, § 66, because serving such a notice is the bringing of an action within the meaning of the statute, after which such declarations are declared inadmissible. The presumption, however, is plain that it was the legislative purpose that this language should have its ordinary meaning as used in our laws, and the words "commencement of the action" refer to the date when proceedings are instituted by a writ or other legal process issuing from the clerk's office. *Ford v. Phillips*, 1 Pick. 202. *Gardner v. Webber*, 17 Pick. 407, 412. *Commonwealth v. Casey*, 12 Allen, 214, 217.

While a preliminary finding of the good faith of the declarant by the court is required before such declarations can be received, this judicial action is to be inferred from the admission of the evidence itself where the exceptions fail to state that the inquiry was not made. *Dixon v. New England Railroad*, 179 Mass. 242, 246. These declarations therefore were within the statute, and properly admitted in evidence. *Brooks v. Holden*, 175 Mass. 187.

By an ordinance duly enacted the city had established a lamp



department, that included the lamps and other property used in its system of street lighting, the management of which was entrusted to an officer therein designated as a superintendent of lamps. The defendant now insists that he was a public officer for whose negligence it was not responsible. It relies in support of this position upon the St. of 1825, c. 8, permitting the city to set up and maintain lamps in its streets, so far as might be convenient and necessary for the purpose of lighting them, "and to make all necessary contracts, rules, orders, and regulations respecting said lamps."

Under the Prov. St. 1773-74, c. 12, 5 Prov. Laws, (State ed.) 801, confirmed by St. 1796, c. 69, enacted when Boston was a town, and the St. 1825, c. 8, passed after it became a city, the defendant was authorized, but not required, to maintain lamps to light its streets, and to enact proper ordinances providing for the punishment of those "breaking or otherwise damaging the same."

No general statutory duty is imposed upon cities and towns requiring them to light their streets for any purpose. See Pub. Sts. c. 208, § 76. But when they are lighted at the expense of the municipality, authority to tax for such an expenditure must be given by statute. *Minot v. West Roxbury*, 112 Mass. 1. *Coolidge v. Brookline*, 114 Mass. 592, 594.

It has been said that the probable reason for the passage of these special laws was the limitation on the taxing power of the defendant, as without them neither the town nor the city could have established and maintained lawfully a system of artificial lighting of its streets to be paid for out of the public revenue. *Spaulding v. Peabody*, 153 Mass. 129, 131, 132.

In suits for damages caused by defects in streets which at night may become dangerous to travellers because they are dark and unlighted it uniformly has been held that as a city or town is under no statutory requirement to light them an omission to do so does not constitute negligence. *Sparhawk v. Salem*, 1 Allen, 80, 82. *Randall v. Eastern Railroad*, 106 Mass. 276. *Lyon v. Cambridge*, 136 Mass. 419. *Spillane v. Fitchburg*, 177 Mass. 87, 88.

But if, under no obligation imposed by statute, the defendant undertook this service for the general convenience of its citizens and travellers within its borders, it also by so doing derived an



incidental benefit by the protection thus afforded of decreasing the probability of actions against it for defective public ways, under R. L. c. 51, §§ 1, 18. An unlighted public way indeed may be dangerous when used at night, though not thereby rendered defective. If, however, it is out of repair, and this condition has been undiscovered, or if discovered not remedied, the probability that travellers using it would be less likely to be injured when lighted than if unlighted, is apparent and appreciable.

It was unnecessary for the plaintiff to show that any direct commercial profit had been derived. The indirect benefit thus conferred supplied a sufficient motive for the defendant's action. Having voluntarily undertaken the enterprise for its private benefit, and not acting in the performance of any public duty, it is liable for negligence in the management of its corporate property when used for such purpose. *Perry v. Worcester*, 6 Gray, 544. *Bigelow v. Randolph*, 14 Gray, 541, 543. *Hawks v. Charlemont*, 107 Mass. 414. *Sullivan v. Holyoke*, 135 Mass. 273. *Tindley v. Salem*, 137 Mass. 171. *Waldron v. Haverhill*, 143 Mass. 582. *Doherty v. Braintree*, 148 Mass. 495. *Coan v. Marlborough*, 164 Mass. 206, 208. *Collins v. Greenfield*, 172 Mass. 78. *Butman v. Newton*, 179 Mass. 1.

By the ordinance the superintendent of lamps among other duties was required at the expense of the city to keep and maintain "all lamp posts" in good repair. It was through his negligence that the lamp post that fell was allowed to fall into decay.

That the city could act as well by ordinance in the creation and appointment of agents charged with duties to be performed in its behalf as by a direct vote of the city council is settled. *Jensen v. Waltham*, 166 Mass. 344, 346. *Butman v. Newton*, *ubi supra*.

But as we have said the defendant was under no municipal duty to establish and maintain street lights, which were classified by its ordinance as a lamp department.

It follows that the superintendent of this department, whether elected by the city council or appointed by the mayor, does not belong to that class of public officers, of which highway surveyors afford a familiar illustration, for whose official acts cities and



towns are not held liable; for he is not charged with the performance of duties prescribed by any statute, where he would act independently, but he acts, if at all, under the ordinance as a municipal agent of the defendant. *Walcott v. Swampscott*, 1 Allen, 101. *Hawks v. Charlemont*, 107 Mass. 414. *Sullivan v. Holyoke*, 135 Mass. 273. *Deane v. Randolph*, 132 Mass. 475. *Waldron v. Haverhill*, 143 Mass. 582. *Butman v. Newton*, 179 Mass. 1.

Being thus under the immediate direction and control of the city, it had full authority to direct the manner in which his department should be conducted. If the defendant lighted its streets as a matter of convenience and safety for those having occasion to use them at night without being required by law to undertake the performance of such a duty, the superintendent of lamps for this purpose became its servant, for whose negligent conduct in their maintenance it was responsible.

A majority of the court is of opinion that the order must be,  
*Exceptions overruled.*

The case was argued at the bar in January, 1905, before *Knowlton, C. J., Morton, Lathrop, Loring, & Braley, JJ.*, and afterwards was submitted on briefs to all the justices.

*S. M. Child*, for the defendant.

*E. R. Anderson*, (*A. T. Smith* with him,) for the plaintiff.



### HARVEY S. PARKER vs. BARTHOLOMEW M. YOUNG.

Middlesex. March 9, 1905. — September 7, 1905.

Present: KNOWLTON, C. J., LATHROP, BARKER, HAMMOND, & BRALEY, JJ.

*Replevin. Officer. Conversion.*

If an officer takes goods on a writ of replevin from one having a valid lien thereon, and delivers them to the plaintiff in replevin upon his giving a bond, the sureties on which have been approved by a master in chancery but without notice to the defendant in replevin as required by R. L. c. 190, § 16, and if the plaintiff in replevin commits a breach of the condition of the bond by failing to prosecute his action, and the sureties on his bond prove to be worthless, the defendant in replevin may maintain an action of tort in the nature either of trespass or trover against the officer for the damages sustained by him, as the officer,



although his original taking of the goods is lawful, by delivering them to the plaintiff in replevin without complying with the provisions of the statute becomes a wrongdoer from the beginning.

TORT, against a deputy sheriff, for the alleged conversion of a horse, harness and carriage. Writ in the First District Court of Eastern Middlesex dated March 18, 1904.

On appeal to the Superior Court the case was tried before *Wait, J.* It appeared that on December 5, 1903, the defendant, under a replevin writ dated November 18, 1903, and returnable on the first Monday in January, 1904, in which one Minnie L. Jones was the plaintiff and Harvey S. Parker, the present plaintiff, was the defendant, took from Parker the chattels in question and gave Parker an attested copy of the writ and bond; that the bond was dated and executed on November 18, 1903, and the sureties thereon were approved by a master in chancery on December 5, 1903, before the service of the replevin writ and the taking of the chattels; that no notice of a time and place at which the sureties on the bond could be examined ever was given to Parker either by the master or the defendant, nor was such notice waived in writing; that the writ and bond were in the usual form, the latter being for \$500 and containing a printed form for the return by the officer of any notice he had given; that, immediately after the taking, the value of the chattels was agreed to be \$150 by the parties in the replevin suit, and the defendant delivered them to the plaintiff in replevin, and took a receipt therefor; that the writ and bond were duly returned to court by the officer, but the writ never was entered; and that no demand was made on the defendant for the return of the chattels. To this extent the facts were undisputed.

The plaintiff also introduced evidence, contradicted by evidence of the defendant, that the plaintiff when the chattels were taken had a valid lien thereon; that objection was made to the taking of the chattels, and that the officer was told that the sureties on the bond were known to the plaintiff to be worthless; that they were in fact worthless; that the officer was asked by the plaintiff when the chattels were taken whether the plaintiff was not entitled to have the sureties examined, and that the officer replied that he must take the chattels and the plaintiff could look to the bond.



At the close of the evidence, requests for rulings were handed to the judge by both parties, and the plaintiff then asked to be allowed to amend his declaration for a conversion, by inserting a count in trespass or action on the case. This the judge refused, and the plaintiff excepted. The judge then, at the request of the defendant, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

*M. E. S. Clemons*, for the plaintiff.

*H. Dunham*, (*G. F. James* with him,) for the defendant.

**BRALEY, J.** In serving the writ of replevin, although the defendant properly could seize and remove the chattels in which the plaintiff as lienor claimed a special property, they lawfully could not be delivered to the plaintiff in replevin before receiving from him the customary bond with sufficient sureties. *Wolcott v. Mead*, 12 Met. 516. *Hamberger v. Seavey*, 165 Mass. 505. R. L. c. 190, § 9.

It is left optional with the replevying officer to approve the sureties and thus become responsible if subsequently they are found financially insufficient, or to refer this question to a magistrate authorized to act, for his decision, and so avoid this liability. R. L. c. 190, §§ 15, 16. *Stone v. Jenks*, 142 Mass. 519, 520. *Bowditch v. Harmon*, 188 Mass. 290.

If the latter course is adopted the defendant under § 16 is entitled to notice in writing from the officer, stating the time and place of hearing with the names and places of residence of the sureties proposed.

In the present case this statutory requirement being ignored, the approval by the master in chancery was a nullity, and so far the bond must be treated as if no approval of the sureties had been given.

The purpose served by a proper bond is to provide security to the defendant, if he prevails, for a return of the property, and to indemnify him for such damages and costs as he may be entitled to recover. *Smith v. Whiting*, 97 Mass. 316. *Stevens v. Tuitt*, 104 Mass. 328, 333, 334.

If the sureties when they are approved by the officer are found to have been irresponsible at the time of acceptance, and in the exercise of a reasonable discretion he should have known of their



insufficiency, a suit against him can be maintained, whether his approval is in writing, which is evidence only of his official action, or without doing so he executes the process. *O'Grady v. Keyes*, 1 Allen, 284. *Stone v. Jenks*, 142 Mass. 519. *Carter v. Duggan*, 144 Mass. 82, 85.

While the writ, with the bond, was properly returned by the defendant to the court from which it issued, the action was not entered. This failure to prosecute the action constituted a breach of the conditions of the bond which gave to the present plaintiff as obligee a cause of action to recover at least nominal damages. *Smith v. Whiting*, 97 Mass. 316. *Easter v. Foster*, 178 Mass. 39.

Without recognizing the validity of the bond, the sureties on which for the purpose of these exceptions must be considered as having been insufficient, he now contends, that as no security within the meaning of the statute was taken, the defendant became a trespasser. If so, it would follow that the delivery of the property being unauthorized an action in some form to recover damages could be maintained without awaiting the termination of the replevin suit. *Purple v. Purple*, 5 Pick. 226. *Dearborn v. Kelley*, 8 Allen, 426.

Upon an examination of the return on the replevin writ, in connection with the bond, it appears that before delivery while an instrument in suitable form was taken in twice the value of the replevied property, it is not stated that any investigation of the sureties was made by him, or that in his judgment they were pecuniarily satisfactory.

It has been held that when an officer's return in an action of replevin shows that a bond was taken, without further description, the presumption follows that the proper statutory bond is meant. *Hartlep v. Cole*, 120 Ind. 247. See *Richardson v. Smith*, 1 Allen, 541.

But if the return is treated as evidence in his favor it is not conclusive. *Whithead v. Keyes*, 8 Allen, 495. There was further evidence from which it could have been found that the actual wrong suffered by the plaintiff arose from delivering the chattels without this preliminary question being determined, owing to the defendant's misfeasance, when if his official duty had been regularly performed the sureties proposed would have been rejected, and competent sureties taken in their place.



For this misconduct it is true that an action of tort in the nature of trover cannot be maintained, as the appropriate remedy would be a suit for damages caused by his negligence. *Livermore v. Bagley*, 3 Mass. 487, 512. *Laflin v. Willard*, 16 Pick. 64. *Stern v. Knowlton*, 184 Mass. 29.

The bond, however, being regular in form and duly executed when delivered to the replevying officer, was valid and binding upon obligor and sureties alike without his approval, or that of a magistrate. As the approval of either formed no part of the obligation, this omission did not affect its validity, or render it unenforceable. *Morse v. Hodsdon*, 5 Mass. 814. *Simonds v. Parker*, 1 Met. 508, 513. *Wolcott v. Mead*, 12 Met. 516, 518. *Stone v. Jenks*, 142 Mass. 519.

But the right to indemnity under it, and if the sureties were found to have been financially worthless, then to recover damages from the defendant, or from the sheriff, whose deputy he was, did not accrue unless there was a breach of its conditions. Until then this form of procedure was not available for the bond must be considered as representing the property. *Stevens v. Tuite*, 104 Mass. 328. *Stone v. Jenks*, 142 Mass. 519. *Carter v. Duggan*, 144 Mass. 82. *Miner v. Coburn*, 4 Allen, 136. *Parker v. Simonds*, 8 Met. 205. *Easter v. Foster*, 173 Mass. 39. *Stern v. Knowlton*, 184 Mass. 29.

The plaintiff might have pursued this course, but he was not obliged to await the termination in any form of the proceedings in replevin, as he could bring suit directly against the defendant, who then must justify his seizure and delivery of the property.

Even if the writ under which he acted was regularly returned, and under *Tubbs v. Tukey*, 3 Cush. 438, 440, this afforded him as ample protection as if it had been entered, he rightfully could not deliver the chattels except upon a strict compliance with the provisions of R. L. c. 190, § 9, which among other precedent conditions required sufficient sureties to be furnished before the replevin fully could be executed.

Under the course pursued, without the examination or approval by any one authorized to act, adequate security was not taken, and this neglect to comply with an essential condition deprives him of any justification which otherwise might have been afforded by the replevin writ. *Moors v. Parker*, 8 Mass.



310. *Morse v. Hodsdon*, 5 Mass. 314, 317. *Cushman v. Churchill*, 7 Mass. 97. *Purple v. Purple*, 5 Pick. 226. *Dearborn v. Kelley*, 3 Allen, 426. *Hall v. Monroe*, 73 Maine, 123.

If the original taking of the chattels was lawful, their delivery being unlawful, he became a wrongdoer from the beginning, and liable, at the election of the plaintiff, either in trespass or trover, for the damages sustained. *Nelson v. Merriam*, 4 Pick. 249, 250. *Woodbury v. Long*, 8 Pick. 543, 545. *Pierce v. Benjamin*, 14 Pick. 356, 360. *Stanley v. Gaylord*, 1 Cush. 536, 547.

Inasmuch as the act of delivery was an exercise of authority and dominion which deprived the plaintiff of his property, this furnished evidence of a conversion sufficient to support the present action without proof of a previous demand. *Stanley v. Gaylord*, 1 Cush. 536. *Riley v. Boston Water Power Co.* 11 Cush. 11, 14. *Spooner v. Holmes*, 102 Mass. 503, 506. *Spooner v. Manchester*, 133 Mass. 270, 274. *Scollard v. Brooks*, 170 Mass. 445.

*Exceptions sustained.*







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exchange repudiated the transaction, as the evidence would not warrant a finding that the customer told his broker that he would make the exchange. *Quinn v. Burton*, 466.

*Conflicting Interests of Agent.*

2. The clerk of a person who has borrowed money from a bank, on collateral which the bank considers of insufficient value, properly can act as agent of the bank in procuring a person to purchase the loan from the bank, where each employer knows of his employment by the other, and a promise of the bank to pay the clerk a commission for performing this service is enforceable against it, the original borrower having no interest antagonistic to that of the bank in the transaction and the general employment of the clerk requiring the performance of separate and different duties from those which he performs as agent of the bank. *Burr v. Beacon Trust Co.* 131.

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## ATTACHMENT.

*Of Mortgaged Personal Property.*

1. Statutory methods of attaching mortgaged personal property discussed by LORING, J. *Jenness v. Shrieves*, 70.
2. Mortgaged personal property cannot be attached as if unincumbered and the mortgagee summoned to answer questions under R. L. c. 167, § 74, when the property is in the possession of the mortgagor. *Ibid.*
3. Where mortgaged personal property has been taken by the mortgagee for breach of condition and is in the hands of an auctioneer for foreclosure sale, a seizing of the property by an officer on an attempted attachment under R. L. c. 167, § 74, which is void because the property is not in the possession of the mortgagor, is a conversion. *Ibid.*
4. If a mortgagee of personal property which has been attached on a writ against the mortgagor before default, in attempting to make a demand on the attaching officer under Pub. Sts. c. 161, § 75, in good faith demands an amount largely in excess of the amount due by inadvertently naming the amount of the mortgage note instead of the sum of money actually advanced upon it, and if the mortgagee does not show that the attaching creditor was not prejudiced by the overstating of the amount demanded, the demand is void and the attachment is good against the mortgage. *Cousins v. O'Brien*, 146.
5. Where a mortgagee of personal property which has been attached on a writ against the mortgagor, who subsequently becomes insolvent, has failed to take any steps toward foreclosing his mortgage for a breach of condition by the mortgagor in allowing the property to be attached, and has made no valid demand on the attaching officer for the payment of the debt secured by his mortgage, a delivery of the property by the attaching officer to the assignee in insolvency of the mortgagor does not constitute a conversion of the property or give the mortgagee any right of action against the officer. *Ibid.*

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**BANKRUPTCY.***Rights of Trustee.*

In a suit in equity by a trustee in bankruptcy to set aside a conveyance by the bankrupt to a third person to the use of his wife and by the wife to her sister, as in fraud of creditors, it was held that on the facts found by a master to whom the case had been referred the title of the defendants under a foreclosure of a mortgage was independent of that of the bankrupt and good against the plaintiff. *Hesseltine v. Hodges*, 247.

**BILLS AND NOTES.***What negotiable.*

1. A check indorsed in blank by the payee and delivered in exchange for the note of another person in pursuance of an arrangement for the accommodation of the drawer of the check, deposited by the person who receives it in a bank to his credit in the ordinary course of business and immediately drawn against by him, is a negotiable instrument and subject to the law relating to such instruments, and the bank taking the check in good



faith and paying full value for it is not affected by equities between the drawer of the check and the person depositing it. In such a case a stranger to the original transaction taking up the check by paying its full amount to the bank after it has been dishonored is entitled to all the rights of the bank against the drawer. *Symonds v. Riley*, 470.

*Rights of Holder.*

Stranger to transaction in which check was given under such circumstances as to be negotiable instrument, if he takes up check after it has been dishonored by paying its full amount to bank where it has been deposited, is entitled to all rights of bank against drawer of check, see *ante*, 1.

*Alteration.*

2. Under R. L. c. 73, § 141, a holder of a promissory note in due course, although it has been materially altered without the consent of the indorser, may enforce payment of the note according to its original tenor against such indorser, if the holder was not a party to the alteration. *Thorpe v. White*, 333.

*Spoliation.*

3. In an action by an administrator on a promissory note alleged to have been given by the defendant to the plaintiff's intestate and to have been destroyed wrongfully by the defendant after the death of the intestate, if the plaintiff proves that the defendant gave the note and destroyed it as alleged, but there is nothing to show the date of the note or when it was payable or how it was executed except that it was signed by the defendant, there is an inference that at the time of the spoliation after the death of the intestate the note was valid and was enforceable against the defendant upon the appointment of an administrator, so that under R. L. c. 202, § 10, the administrator may recover on the note if his action is brought within two years from the time of his giving bond as limited by R. L. c. 141, § 9. *Sullivan v. Sullivan*, 380.

*Renewal of Collateral Note.*

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## BOSTON.

Under Prov. St. 1778-74, c. 12, confirmed by St. 1796, c. 69, when Boston was a town, and by St. 1825, c. 3, after it became a city, that city was authorized, but was not required, to maintain lamps to light its streets, and to enact proper ordinances providing for the punishment of persons breaking or damaging the lamps. *Dickinson v. Boston*, 595.

St. 1902, c. 527, authorizing assessment of betterments for certain improvements, not invalid as authorizing two assessments for same improvement, see CONSTITUTIONAL LAW, 3.

St. 1903, c. 381, as to construction of Northern Avenue in Boston does not impair obligation of contract as to extension of Eastern Avenue, see CONSTITUTIONAL LAW, 11.

St. 1903, c. 381, as to construction of Northern Avenue unconstitutional in part only, see CONSTITUTIONAL LAW, 1.

St. 1903, c. 381, as to construction of Northern Avenue provides for public purpose, see CONSTITUTIONAL LAW, 5.

Hancock Avenue at west of State House grounds is not street within meaning of St. 1892, c. 419, § 25, restricting height of buildings in Boston, see WAY, 1.

Improvement of Columbus Avenue under St. 1894, c. 416, not completed until construction finished, and betterments for improvement are assessable under St. 1902, c. 527, although order for extension and widening was passed more than six years before passage of statute, see TAX, 4.

Assessment of betterments under St. 1902, c. 527, valid if it is less than one half of the amount legally expended for land damages, although part of the additional expense for construction may have been incurred illegally, see TAX, 5.

## BOSTON ELEVATED RAILWAY COMPANY.

1. A petitioner under St. 1894, c. 548, § 8, for damages from the location, construction, maintenance and operation of the elevated railway of the Boston Elevated Railway Company, is entitled to recover for injury to his property not only from noise caused directly by the operation of the elevated trains but also for injury from the increase of noise in the operation of the surface cars under the elevated structure caused by the existence of that structure. *Logan v. Boston Elevated Railway*, 414.

2. On a petition under St. 1894, c. 548, § 8, against the Boston Elevated Railway Company for damages to the petitioner's property from the location, construction, maintenance and operation of the respondent's elevated railway, the petitioner is not entitled to damages for any annoyance or injury suffered by the customers of tenants in the petitioner's buildings from their horses being frightened by the operation of the road when driven to the premises, the suffering from this inconvenience being a condition common to all persons driving horses in that vicinity. *Swain v. Boston Elevated Railway*, 405.

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## BOSTON SOCIETY OF NATURAL HISTORY.

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## BURGLARIOUS IMPLEMENTS.

Two defendants indicted under R. L. c. 208, § 41, for having in their possession tools and implements designed for committing burglary with intent to use them for that purpose, properly may be found guilty if it appears that the implements described in the indictment were found in a bag, to which one of the defendants had a key, in a room hired by another person, that the defendants were in the house with that person on the day on which the bag was found and went out of the house with him and afterwards returned without him, asking for the bag, that they gave a false account of the whereabouts of the person who hired the room, and disclaimed all knowledge of the bag and its contents, that when asked what they used certain revolvers and fuses for they made no answer, and when asked what use they made of a certain rubber bag, afterwards shown to contain nitroglycerine, one of them jumped back in such a way as to indicate that he knew what was in it and made no answer. *Commonwealth v. Conlin*, 282.

## CAMBRIDGE.

*Chief of Police.*

Chief of police of Cambridge appointed under chapter 20, § 1, of Revised Ordinances of that city, when discharged under same ordinance cannot maintain mandamus for reinstatement on ground that ordinance is invalid, see **MUNICIPAL CORPORATIONS**, 7.

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*Certiorari (continued).*

2. The writ of certiorari is not one of right, and will not be issued to quash a sewer assessment made under a statute afterwards held to be unconstitutional, where the petition for the writ is filed nearly six years after the assessment and it seems probable that there was some special agreement between the city and the petitioner's predecessor in title under which he was content with the assessment and did not wish to contest its validity, and where the petitioner himself has made without protest five of the ten payments into which the assessment has been apportioned and has made use of the sewer. *Harwood v. Donovan*, 487.

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Corporation organized under Pub. Sts. c. 115, to provide home for working girls at moderate cost found to be charitable institution, see *TAX*, 7.

### COMMON VICTUALLER.

On the trial of a complaint under R. L. c. 102, § 1, for assuming to be a common victualler without being licensed, if it appears that the defendant caused a license to be procured in the name of another person and assuming to act under such license carried on a restaurant for his own profit and not as agent or servant of the licensee, he can be found to be guilty under the statute, although he honestly believed that he had a right to conduct the business in this way, an intention to violate the law not being necessary to the commission of the offence. *Commonwealth v. Lavery*, 13.

### COMPROMISE, AGREEMENTS OF.

Provision of Pub. Sts. c. 136, § 24, (R. L. c. 141, § 24,) in regard to payment of income "given by will or by an instrument in the nature thereof" from the decease of the testator, does not apply to income of fund created by agreement of compromise as to rights under will, made more than year after will had been proved and allowed, see *WILL*.

### CONSTITUTIONAL LAW.

#### *Unconstitutionality of Part of Statute.*

1. In St. 1903, c. 381, authorizing the laying out and construction of Northern Avenue in Boston, although the provision at the end of § 2, that no compensation, with a certain exception, shall be paid for lands or flats of the Commonwealth or of the city of Boston or of the Boston Wharf Company or of certain railroads within Northern Avenue or Sleeper Street, is unconstitutional and void, it relates to a separate and independent subject and its unconstitutionality does not affect the validity of the rest of the statute. *Wheelwright v. Boston*, 521.



*Assessments.*

2. Pub. Sts. c. 50, § 7, (R. L. c. 49, § 5,) providing for sewer assessments and contemplating that they should be proportional, should be read as if it contained the words "but in no case shall an assessment be made that exceeds the special benefit received by the estate assessed," and so construed is constitutional. *Cheney v. Beverly*, 81.
  3. St. 1902, c. 527, authorizing the assessment of betterments for certain improvements in the city of Boston completed by that city within six years before the day of the passage of the act, authorizes only one assessment for each improvement within its terms, and is not invalid as purporting to authorize two assessments for the same improvement. *New England Hospital v. Street Commissioners*, 88.
- For validity of assessments under St. 1902, c. 527, see TAX, 3-5.

*Police Power.*

4. St. 1903, c. 473, requiring the registration of automobiles, the payment of a registration fee of \$2, and the marking of the registered number in Arabic numerals not less than four inches long, is constitutional. *Commonwealth v. Boyd*, 79.

*Public Purpose.*

5. St. 1903, c. 381, authorizing the laying out and construction of Northern Avenue in Boston is not unconstitutional as imposing upon that city an expenditure of public money for a private use. *Wheelwright v. Boston*, 521.

*Vested Rights.*

6. The right to object to a statute as unconstitutional on the ground that it violates vested rights may be waived. *Hellen v. Medford*, 42.
7. St. 1900, c. 196, providing that the park commissioners of Medford might by a deed acknowledged and recorded abandon any part of the land or rights in land taken by them under statutory authority on a certain date and that such abandonment should revert the title as if no taking had been made and might be pleaded in reduction of damages in any suit on account of those takings, is unconstitutional as violating the vested rights to compensation of an owner and of a lessee of land taken in fee by the park commissioners on the date named. *Ibid.*
8. After certain land had been taken in fee by park commissioners under statutory authority a statute was passed authorizing them to abandon any land taken on a certain day and providing that such abandonment might be pleaded in reduction of damages in any suit on account of the taking. The owner of land which thus had been taken and abandoned agreed with the city for which the park commissioners took the land that if his land was abandoned by the city for his benefit his damages would be very small, if any, and that \$1,000 would be a reasonable sum for him under that agreement. *Held*, that the landowner had waived the right to set up the unconstitutionality of the statute as violating his vested right to compensation for the taking of his land in fee. *Ibid.*



*Taking Property without Compensation.*

9. Under St. 1903, c. 158, § 1, authorizing the metropolitan park commissioners to "make such reasonable rules and regulations respecting the display of signs, posters or advertisements in or near to and visible from public parks and parkways entrusted to their care, as they may deem necessary for preserving the objects for which such parks and parkways are established and maintained," a rule forbidding the maintenance of business signs so near a parkway in the care of the commissioners as to be plainly visible to the naked eye of persons in the parkway, is not a reasonable regulation, being contrary to the provisions of the Constitution in taking property for a public use without providing compensation. *Commonwealth v. Boston Advertising Co.* 348.

Unconstitutionality of provision in St. 1903, c. 381, forbidding compensation on construction of Northern Avenue in Boston, *see ante*, 1.

*Equal Protection of the Laws.*

10. R. L. c. 203, § 9, which, when cases are tried together, gives the presiding judge power in his discretion to reduce the costs in such a way as to leave no costs in some of the cases, is not unconstitutional, as depriving a plaintiff thus losing his costs of the equal protection of the laws, or for any other reason. *Green v. Sklar*, 363.

*Validity of Municipal Contract requiring Union Scale of Wages.*

*Quære* as to validity of municipal contract and invitation for bids therefor providing that contractor shall pay union scale of wages, even if a statute purports to authorize it, *see CONTRACT*, 4.

*Impairing Obligation of Contracts.*

11. St. 1903, c. 381, authorizing the laying out and construction of Northern Avenue in Boston is not unconstitutional as impairing the obligation of the contract in regard to building an extension of Eastern Avenue in Boston made under authority of St. 1868, c. 326. *Wheelwright v. Boston*, 521.

*Interstate Commerce.*

12. St. 1903, c. 437, §§ 58, 66, 67, 75, imposing an excise tax on every foreign corporation organized for certain purposes "which has a usual place of business in this Commonwealth," although it does not apply to a corporation whose place of business is established and maintained solely for use in interstate commerce, applies to a corporation engaged in interstate commerce which at the same time has a place of business for other purposes, and so applied is constitutional. *Attorney General v. Electric Storage Battery Co.* 239.

## CONTEMPT.

1. Under R. L. c. 193, § 9, and R. L. c. 156, § 3, a writ of error from this court lies to reverse a judgment of the Superior Court punishing a criminal contempt of court consisting of an offer to influence and corrupt jurors sitting in the trial of a case. *Hurley v. Commonwealth*, 443.



2. A writ of error from this court lies to reverse a judgment of the Superior Court ordering the proprietor of a newspaper to pay a fine for contempt of court in publishing after an indictment for murder and before the trial a statement and discussion of a portion of the government evidence supposed to have been prepared for the trial. *Globe Newspaper Co. v. Commonwealth*, 449.
3. A formal presentation to the court signed by a sworn prosecuting officer is a sufficient verification of facts constituting a constructive criminal contempt to justify judicial action. *Hurley v. Commonwealth*, 443.
4. Under R. L. c. 166, § 18, providing that commitments for contempt of court may be made to any jail in the Commonwealth, a criminal contempt of court cannot be punished by imprisonment in the house of correction. R. L. c. 220, § 5, does not apply to a case of contempt. *Ibid.*
5. It is not a ground for reversing a judgment of the Superior Court, ordering the proprietor of a newspaper to pay a fine for contempt of court in publishing a statement of a portion of the government evidence supposed to have been prepared for a murder trial with facsimiles of handwriting and signatures and a discussion of the opinions of experts, that at the time of the publication the trial was not in progress nor immediately to take place, if the indictment had been found several months before and a time had been appointed for the trial and afterwards the trial had been postponed and its date had not been fixed. Nor is it any ground for the reversal of such a judgment that the statements in the publication were true, or that the publisher did not intend to injure either of the parties to the case or to interfere with the administration of justice. *Globe Newspaper Co. v. Commonwealth*, 449.

## CONTRACT.

### *What constitutes.*

1. In an action on an alleged oral contract to pay personally a promissory note of the deceased father of the defendant, if the plaintiff contends that in consideration of the defendant's promise to pay the note the plaintiff discharged the estate and accepted the defendant as his sole debtor, but the evidence produced by the plaintiff is consistent with the acceptance by the plaintiff of a voluntary promise of the defendant not binding and known not to be binding in preference to his chance of recovering the amount of the note or a dividend from the estate, this does not sustain the burden of proof imposed upon the plaintiff by the law. *Crowell v. Moley*, 116.
2. In an action for the price of one thousand gross of ping pong balls shipped by the plaintiff to the defendant under an alleged contract for the sale and shipment of a much larger number of like ping pong balls, of which all the others had been delivered and paid for, it was *held*, that the correspondence described in the opinion warranted a finding by the judge who heard the case, without a jury, upon an agreed statement of facts with the power to draw inferences, either that the defendant, there being no dispute as to the price, absolutely had undertaken to receive and pay for nine hundred thousand balls not to be delivered before November 20 of the year



Contract (*continued*).

when the contract was made, subject to an agreement on the part of the plaintiff to turn them out more quickly if it could do so, and that the defendant was bound to receive and pay for the thousand gross in controversy, or that, if there was an agreement on the part of the plaintiff that shipments should be made at the rate of two thousand gross per month and that they should be completed by October 20, those requirements were waived by the defendant. *Jaques & Son v. Parker Brothers*, 94.

*Validity.*

3. A contract made by a pneumatic service company to employ a person for five years as its agent in attending to government and franchise matters at a salary of \$7,200 a year and reasonable travelling expenses, but agreeing that when the contracts of the company amount to \$2,000,000 per year the salary shall be increased to \$10,000 per year, is not invalid on its face as contrary to public policy, the use of corrupt practices not being a necessary incident of the performance of such a contract. *Kerr v. American Pneumatic Service Co.* 27.
4. Whether a statement contained in an invitation for proposals to construct a street for a city, that the proposal of a bidder who will pay the full trade union scale of wages may be accepted in preference to that of a bidder who will pay wages according to a lower scale, and a clause in a contract for such construction that the contractor shall pay the full trade union scale of wages to his employees, make such a contract invalid even if a statute purports to authorize it, is an open question in this Commonwealth. *Gardiner v. Street Commissioners*, 223.
- Clerk of borrower from bank held entitled to commission under agreement for obtaining for bank a purchaser of the loan, see AGENCY, 2.
- Validity of agreement by attorney extending time for payment of costs ordered as condition of amendment, see ATTORNEY.
- Contract of city with railroad company to maintain gateman at crossing in consideration of withdrawal of opposition to laying out of highway there valid where made in contemplation of order of county commissioners subsequently passed, see MUNICIPAL CORPORATIONS, 1.
- Sale of property to corporation by its promoters at large profit without disclosure of material facts voidable by corporation, see CORPORATION, 5-8.

*Implied: Common Counts.*

5. In an action for \$75 had and received to the plaintiff's use, it appeared that the defendant agreed to pay that sum in settlement of an action and claim for rent by a third person against the plaintiff, whereupon the plaintiff gave the defendant \$25 in cash and surrendered to him two receipts representing \$50 which the plaintiff previously had paid to the defendant upon a mortgage debt, the defendant agreeing to pay the \$50 previously received from the plaintiff in settlement of the action against the plaintiff instead of applying it in reduction of the mortgage debt, and that the defendant paid nothing in settlement of the action and claim against the plaintiff. *Held*, that the plaintiff could recover the sum of \$75 in this action. *Clark v. Jenness*, 297.



6. An action for money had and received will not lie for the conversion of a certificate of shares in a corporation which is not sold by the wrongdoer but is surrendered by him to the corporation in exchange for a new certificate in his own name. *Hagar v. Norton*, 47.

Action for money had and received survives, see SURVIVAL OF ACTIONS.

Builder failing substantially to perform contract cannot maintain mechanic's lien for value added to property, see MECHANIC'S LIEN, 1.

Electing person officer of corporation ordinarily does not imply agreement by corporation to carry on business for year, see CORPORATION, 2.

#### *Construction.*

7. To leave to a jury the question, whether under a certain contract in writing the customer of a company furnishing him with electric light had a right to assume that the company under the contract undertook the inspection of the plaintiff's premises, is error, the construction of the contract being a question of law for the court. *Brunelle v. Lowell Electric Light Co.* 498.
8. In an action against a company furnishing electricity, for personal injuries from a shock of electricity received when taking hold of a portable cord to carry an electric lamp to a part of the cellar under the plaintiff's shop, it appeared, that a contract in writing by which the defendant agreed to connect its electric system with the plaintiff's shop and to furnish electric current for a certain number of incandescent lamps of a certain power, contained the following provision: "It is agreed that all wires upon the premises of the customer to which the company's service will be connected, shall be so installed that the company may carry out this contract, and shall be kept in proper condition by the customer: that the customer will give, or obtain all necessary permission, to enable the agents of the company to carry out this contract and to enter the premises at all reasonable times, so long as any of the company's property remains therein, for the purpose of keeping in repair or removing its property or inspecting its own or the customer's wires or apparatus." *Held*, that under this contract the defendant did not owe to the plaintiff the duty of inspecting the wires, and that the clause giving the defendant the right to inspect the premises of the plaintiff was inserted for the protection of the defendant and not for that of the plaintiff. *Ibid*.
9. Where a contract in writing for the preparation of plans by an architect, after the adjustment of an existing indebtedness for services previously rendered, stipulates for similar services by him in the future and contains the statement "The architect's commission on which, at five per cent, is not to exceed the value of \$350," and immediately after contains the statement "It is further mutually understood and agreed that the equity of said before described land is given as security for a further payment of \$250, which sum shall, when paid, be considered to be full payment for said above last named plans," the explicit agreement as to the price to be paid controls the previous mention of a rate of compensation, and if a jury finds that the architect made the plans called for by the contract he is entitled to recover the agreed price of \$250. *Perkins v. Hanks*, 120.



*Contract (continued).*

Whether certain agreement by poor debtor is waiver of Pub. Sts. c. 171, § 15, as to issue of execution is question of law, see *POOR DEBTOR*, 1.

Of certain contract by insurance company to pay agent renewal commissions on policies effected by him accruing after termination of agency, see *INSURANCE*, 7.

*Building Contracts.*

10. If a contract for the mason work of a building, between a subcontractor, called in the contract "the contractor," and the principal contractor for the construction of the building, called in the contract "the owner," provides that if the architect shall certify that the contractor has refused, neglected or failed to perform the work called for by the contract the owner may terminate the employment of the contractor and enter the premises and complete the work, and that in such case the contractor shall not be entitled to receive any further payment under the contract until the work shall be wholly finished, at which time if the unpaid balance to be paid under the contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner, and that expenses "either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties," and if the subcontractor ceases to furnish labor and materials upon the building and the principal contractor, called the owner, by direction of the architect enters upon the premises and completes the work to the satisfaction of the architect, and the architect makes a certificate that he has audited and certified the expense, and includes therein a sum of \$5,000 claimed as a commission by the principal contractor for his services in making the arrangements and supervising the work, this as matter of law is an expense within the meaning of the contract and the architect's certificate upon it is conclusive. *White v. Abbott*, 99.

*Performance and Breach.*

Requirement as to time of shipment of certain goods, waived if it existed, see *ante*, 2.

*Rescission.*

11. If a note payable in two months is accepted in settlement of an account payable immediately, it is too late when the note falls due at the expiration of the two months for the maker of the note after enjoying the advantage of the delay to attempt to rescind it on the ground that the payee had misrepresented the amount of the balance due on the account. If misrepresentations were made by the payee, the maker when sued on the note can show in reduction of damages the true amount due on the account. *Daniel v. Learned*, 294.

Joinder in equity of prayer for rescission of contract with prayer for damages, see *EQUITY PLEADING AND PRACTICE*, 1.

Right of corporation to rescind sale of property to it by its promoters at large profit without disclosure of material facts, and its rights and remedies against the promoters after such rescission, see *CORPORATION*, 6-8.



Right of one deceived by false statement of assets and liabilities of corporation filed under Pub. Sts. c. 106, § 54, to rescind sale of goods on credit to the corporation, see CORPORATION, 11.

*Effect of Contract on Rights of Third Party.*

12. In an action against an elevated railway company by a workman employed by a sub-contractor in building a portion of the defendant's elevated structure in process of construction under a contract between a principal contractor and the defendant, for injuries alleged to have been caused by the negligence of the defendant, the rights of the plaintiff are not affected by the provisions of a contract between the principal contractor and the defendant in regard to accidents to workmen. *Wagner v. Boston Elevated Railway*, 437.

Contract of employer with labor union as to discharge of non-union men does not alter rights of non-union workman discharged at request of agent of union, see MALICIOUS INTERFERENCE, 8.

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One of subscribers to agreement to take stock of corporation is liable on performance of conditions if all stock is subscribed for whether other subscribers pay for stock or not, see CORPORATION, 10.

St. 1903, c. 381, as to construction of Northern Avenue in Boston does not impair obligation of contract as to extension of Eastern Avenue, see CONSTITUTIONAL LAW, 11.

CONTRIBUTION.

Compromise of joint debt by acceptance of property ends debt, and debtor who gave property may enforce contribution against co-debtor, see EQUITY JURISDICTION, 3.

Enforcement of contribution by one joint debtor against co-debtor although debt only paid in part, see EQUITY JURISDICTION, 4.

CONVERSION.

If a mortgagor of a stock in trade includes in the description of the property in the mortgage certain chattels of which the title is in an unpaid vendor under a contract of conditional sale, and acting as agent of the mortgagee retains the key of the building containing the mortgaged property both before and after a foreclosure sale of the property, this is a conversion by the mortgagee of the chattels wrongfully included and retained by his agent, for which the unpaid vendor may maintain an action of tort against him without a previous demand. *Geneva Wagon Co. v. Smith*, 202.

Action for conversion of property obtained by fraud survives, see SURVIVAL OF ACTIONS.

Right of corporation to recover from one of its officers property of the corporation wrongfully converted by him survives against his estate, see CORPORATION, 8.

Action for money had and received will not lie for conversion of certificate of stock exchanged for new certificate, see CONTRACT, 6.



Conversion (continued).

Liability in replevin of officer taking goods where bond not approved according to statute, see REPLEVIN.

Attempted attachment of mortgaged personal property in possession of mortgagee is conversion, see ATTACHMENT, 3.

Delivery of personal property of mortgagor by attaching officer to assignee in insolvency of mortgagor is not conversion as against mortgagee who has not begun foreclosure or made proper demand, see ATTACHMENT, 5.

## CORPORATION.

### Officers.

1. Where a person is both president and manager of a corporation and receives a salary, in the absence of evidence as to the services for which the salary is paid it may be inferred that it is paid for his services as manager. *Busell Trimmer Co. v. Coburn*, 254.

2. Electing a person as an officer of a corporation under ordinary circumstances is not a contract with him for a stated time, and implies no agreement on the part of the corporation to carry on its business through a year. *Ibid.*

3. The right of a corporation to recover from one of its officers property of the corporation wrongfully converted by him, or its value, survives against his estate. *Von Arnim v. American Tube Works*, 515.

4. In a suit in equity by a minority stockholder in a corporation to restrain the officers of the corporation who also are its directors and the holders of a majority of its stock from wrongfully taking the funds of the company, under the guise of commissions or participation in profits, largely in excess of the value of their services, it is not necessary to allege or prove that the plaintiff before filing his bill made an application to the wrongdoers for relief within the corporation. *Ibid.*

Bill in equity to open fraudulent accounts accepted by plaintiff corporation by collusion of its officers, see EQUITY JURISDICTION, 8.

In suit against officers of corporation for wrongful conversion of its property representative of deceased officer may be joined as defendant, see EQUITY PLEADING AND PRACTICE, 4.

Directors in absence of express authority have no power to release subscriber to stock, see *post*, 9.

### Rights of Corporation against its Promoters.

5. A promoter stands in a fiduciary relation to a corporation formed by his promotion, and if he buys property personally with a view to selling it to the corporation and sells it to the corporation at an advance he is bound to disclose all material facts relating to the property, or to see that the corporation has adequate independent advice. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 815.

6. A corporation does not lose by acquiescence the right to avoid a purchase of property sold to it by its promoters in exchange for stock without a disclosure of material facts, if at the date of the directors' meeting at which



the purchase was made the authorized capital stock was one hundred and fifty thousand shares, of which only forty shares had been issued and these were owned by the promoters, if the directors present at the meeting were the two promoters, their attorney and an employee, if at this meeting it was voted to buy the property in question for thirty thousand shares, to buy other property for one hundred thousand shares and to issue to the public twenty thousand shares, and if of the one hundred thousand shares twenty thousand went to the promoters for promotion services and expenses and eighty thousand to the persons who furnished the promoters with funds to buy the property sold by them to the corporation. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 815.

7. A bill in equity may be maintained by a corporation against one of its two promoters to compel, after rescission by the corporation, the restitution of the consideration received for property sold to it by the promoters at a large profit without a disclosure of material facts, although the title to the property conveyed to the corporation stood in the name of the other promoter who had a half interest in the contract, such other promoter being dead and his executors being residents of another State and not made parties to the suit. *Ibid.*
8. In a suit in equity by a corporation against one of its two promoters to compel, after rescission by the corporation, the restitution of the consideration received for property sold to it by the promoters at a large profit without a disclosure of material facts, the plaintiff, if the property has remained unchanged, not only can offer to restore it and demand the return of the consideration, but also has the remedy of waiving its right to a return of the consideration and seeking damages for the equitable tort committed by the defendant while acting in a fiduciary relation, and on this ground *semble*, that either promoter is liable severally as well as the two jointly. *Ibid.*

*Liability of Subscriber for Stock.*

9. The directors of a corporation, in the absence of a statute, a by-law or a vote of the corporation authorizing it, have no power by vote to release one of the subscribers for the stock of the corporation from his obligation to take and pay for a part of the shares for which he has subscribed. *Hastings Lumber Co. v. Edwards*, 587. ✓
10. By the law of the State of Maine one of the subscribers for the stock of a corporation who signs an agreement to take and pay for a certain number of its shares, if all the stock is subscribed for and the corporation is formed, and all the conditions of the subscription are performed, is bound to take and pay for all the shares he has subscribed for, whether the other signers of the subscription paper have paid for their shares or not. *Ibid.*

*False Statement of Assets and Liabilities.*

11. One who has sold goods on credit to a domestic corporation deceived by a false statement of its assets and liabilities filed by its officers under Pub. Sts. c. 106, § 54, with the purpose of giving the corporation a credit to which it was not entitled, may rescind the sale and maintain an action of replevin for the goods. *Steel v. Webster*, 478.



*Corporation (continued).*

*Excise Tax on Foreign Corporations.*

Construction of St. 1903, c. 437, § 75, as to amount of excise tax on foreign corporations, see **TAX**, 6.

St. 1903, c. 437, imposing excise tax on foreign corporations, does not apply to corporations engaged solely in interstate commerce but does apply to those engaged partly in domestic commerce and is constitutional, see **CONSTITUTIONAL LAW**, 12.

*Construction of Charter of Foreign Corporation.*

Special charter of corporation granted by legislature of another State to be construed in light of interpretation by highest court of that State, see **STATUTE**.

**COSTS.**

See **CONSTITUTIONAL LAW**, 13; **PRACTICE, CIVIL**, 26; **EQUITY PLEADING AND PRACTICE**, 6.

**COVENANT.**

Covenant by lessee not to increase fire insurance risk not modified by lessor's knowledge of lessee's manner of conducting his business elsewhere, see **LANDLORD AND TENANT**, 8.

Lessee liable to lessor on covenant to pay all taxes and assessments although lessor has not paid taxes in question, see **LANDLORD AND TENANT**, 7.

**DAMAGES.**

*For Property taken under Statutory Authority.*

Whether fee or easement taken.

1. If a city, authorized by a statute to take land in fee simple or otherwise for the purpose of improving watercourses within its territory, in altering the course and deepening the channel of a certain brook and constructing it as an open brook with low walls, sloping sides and a paved bottom, takes the land through which the brook runs and orders the owners within ten days to take off "fences, trees and other property which may obstruct the construction of said improvement," without declaring that a fee is necessary for the purposes of the taking, only an easement is taken. *Newton v. Newton*, 226.

Admission that land was taken for the improvement of a certain brook, in answer to petition for damages for taking, does not admit taking in fee, see **EVIDENCE**, 9.

Construction of exception.

2. On a petition for damages from the taking of the petitioner's land on a bank of a river by the metropolitan park commissioners under St. 1893, c. 407, and St. 1895, c. 450, if the instrument of taking expressly excepts all rights to take and use the waters of the river for mechanical or manufacturing purposes and rights of flowage, "as well as the right to keep up,



maintain, reconstruct, alter and use any water mill, mill privilege, canal, flume, raceway, mill dam, or flash boards, now lawfully existing or used, together with the right to enter upon the reservation" established by the taking, "so far as necessary to the use and enjoyment of the rights herein excepted," the petitioner is entitled to no damages for the loss of any right to use the land incident to the use of the waters, all such rights being included in the exception whether the structures necessary for such use existed at the time of the taking or not, the taking also excepting all existing structures even though they might not be necessary for the best use of the water in the way it was being used. *Klous v. Commonwealth*, 149.

**Established business.**

3. The owner of a farm in West Boylston of about fifty acres, which has been the only means of livelihood for himself and his family, who for many years has carried on the business of farming by selling the surplus produce of his farm to persons in the village of Oakdale in the town of West Boylston, although he has had no regular route or customers and nothing in the nature of a good will, may be found by the commissioners appointed under St. 1895, c. 488, to have owned "an established business on land in the town of West Boylston" within the meaning of the provisions of § 14 of that statute. *Allen v. Commonwealth*, 59.

*For Breach of Contract to employ Plaintiff.*

4. If a corporation in electing a person as its president and manager at a certain salary makes a contract with him to carry on its business through a year, and subsequently breaks this contract by a sale of all its property within the year, this does not give the officer a right of action against the corporation for his full salary after his services no longer are required, but only the right to recover the difference between the amount of the salary and what he could have earned in some other occupation, and in the absence of evidence such loss will not be inferred. *Busell Trimmer Co. v. Coburn*, 254.

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Joinder in equity of prayer for rescission of contract with prayer for damages, see EQUITY PLEADING AND PRACTICE, 1.

Maker sued on note by payee may show in reduction of damages that it was procured by misrepresentations by payee of amount due, see CONTRACT, 11.

No recovery under St. 1894, c. 548, § 8, for damages from operation of elevated railway frightening horses of tenant's customers, see BOSTON ELEVATED RAILWAY COMPANY, 2.

Recovery under St. 1894, c. 548, § 8, for damages from increase of noise in operation of surface cars caused by existence of elevated structure, see BOSTON ELEVATED RAILWAY COMPANY, 1.

**DIVORCE.**

See MARRIAGE AND DIVORCE.



## DOMICIL.

Married woman may establish separate domicile for purpose of divorce only on proof that she separated from husband for justifiable cause, see **MARRIAGE AND DIVORCE**, 1.

## DYNAMITE.

*Hoe v. Boston & Northern Street Railway*, 187 Mass. 67, affirmed. *Byrne v. Farnum*, 219.

## EASEMENT.

Certain taking of land for course of brook held to be of an easement only, see **DAMAGES**, 1.

For equitable restrictions, see that title.

## ELECTRIC LIGHT COMPANY.

1. Pub. Sta. c. 109, § 17, permitting, after a required notice, the cutting of telegraph and telephone wires in order to move a building or for any necessary purpose, was extended by St. 1883, c. 221, so as to give the same rights in regard to electric light wires. See now R. L. c. 122, § 28. *Richards Building Moving Co. v. Boston Electric Light Co.* 265.

2. *Semble*, that one who has installed electric light wires in his premises without the permission in writing of the inspector of wires as required by a municipal ordinance, if injured by a shock of electricity from one of the wires thus illegally installed, may be precluded from maintaining an action for his injuries against the company furnishing the power if his violation of law contributed to the accident, unless the company's knowledge of this violation estops it from setting up this defence. *Brunelle v. Lowell Electric Light Co.* 498.

Negligence in insulating electric light wires running through trees, see **NEGLIGENCE**, 80.

Negligence in failing after notice to mend break in electric light wire hanging in street, see **NEGLIGENCE**, 81.

As to negligence of one injured by contact with electric light wire hanging over gutter in street, see **NEGLIGENCE**, 82.

No assumption by lamp trimmer of risk from fall of pole rotten below surface of ground, see **NEGLIGENCE**, 38.

Certain contract giving electric light company right to inspect its wires on customer's premises held to impose on it no duty of inspection, see **CONTRACT**, 8.

## ELEVATED RAILWAY.

No damages allowed under St. 1894, c. 548, § 8, for frightening horses of tenant's customers by operation of elevated railway, see **BOSTON ELEVATED RAILWAY COMPANY**, 2.



Recovery under St. 1894, c. 548, § 8, for damages from increase of noise in operation of surface cars caused by existence of elevated structure, see **BOSTON ELEVATED RAILWAY COMPANY**, 1.

Recovery by workman on elevated structure for injuries from loose planks of temporary platform on which he was standing being knocked off by trolley pole of surface car, see **NEGLIGENCE**, 9.

Negligence of, toward passengers, see **NEGLIGENCE**, 6-8.

### ELEVATOR.

Due care of one stepping into elevator well in reliance on defective automatic gate which falsely indicates presence of elevator, see **NEGLIGENCE**, 83.

Evidence of negligence in one maintaining freight elevator with defective platform adjoining it and defective automatic gate, see **NEGLIGENCE**, 34.

Failure of catch to hold up gate of freight elevator car on one occasion no evidence of defect, see **NEGLIGENCE**, 51.

Negligence in maintaining elevator which shakes and jerks in operation, see **NEGLIGENCE**, 52.

Assumption of risk by and due care of boy operating elevator not in good running order, see **NEGLIGENCE**, 40.

### EMINENT DOMAIN.

Certain taking of land for course of brook held to be of an easement only, see **DAMAGES**, 1.

Unconstitutionality of provision in St. 1903, c. 881, forbidding compensation on construction of Northern Avenue in Boston, see **CONSTITUTIONAL LAW**, 1.

### EMPLOYER'S LIABILITY.

Under R. L. c. 106, widow of employee can recover for his death only when instantaneous and without conscious suffering, see **NEGLIGENCE**, 57.

For cases of employer's liability both under the act and at common law, see **NEGLIGENCE**, 35-57.

### EQUITABLE RESTRICTIONS.

St. 1861, c. 183, which incorporated the Massachusetts Institute of Technology, granted to that corporation the right to hold and occupy the westerly portion of a certain square of land then belonging to the Commonwealth between Newbury Street and Boylston Street in Boston "to the extent of two thirds part thereof, free of rent or charge by the Commonwealth," and provided in § 8 that the square in question should "be reserved from sale forever, and kept as an open space, or for the use of" the educational institutions named in the act, and in § 7 that the corporation above named, and another educational corporation to which a



similar grant was made as to the remaining third of the square, should "not cover with their buildings more than one third of the area granted to them respectively." These grants were made in pursuance of a scheme, proposed by the petitioners for the grants, that the square in which the rights were granted should be dealt with in such a way as to enhance the value of the surrounding lots belonging to the Commonwealth, so that their increase in value should equal the value which the reserved square had before the adoption of the plan, and the Commonwealth thus should be reimbursed for the space withdrawn from sale. This scheme was carried out, and the lots surrounding the square belonging to the Commonwealth, after having been reserved under § 8 of the act until the square was built upon and improved by the two educational corporations, were sold at auction in accordance with a plan signed by the commissioners of public lands, which was referred to in the advertisements, and a copy of which was pasted in the catalogues of the sales. On this plan the reserved square was shown with the buildings of the two corporations and the open spaces drawn upon it. St. 1903, c. 438, released to the Massachusetts Institute of Technology all the right, title and interest of the Commonwealth by way of right of re-entry or otherwise in the westerly two thirds of the square, and provided that that corporation "subject to the rights, if any, of other parties" might erect upon all or any part of the premises buildings conforming to the building laws of the city of Boston and in accordance with certain restrictions set forth in the act. The owners of two lots on one of the streets facing the square, which had been purchased respectively at two of the auction sales above described, brought suits in equity against the Massachusetts Institute of Technology to restrain that corporation from covering with its buildings more than one third of the land assigned to it by St. 1861, c. 183. *Held*, that the provisions of §§ 3 and 7 of the last named act, that the square should be reserved from sale forever, and kept as an open space, or for the use of the educational institutions named in the act, and that these institutions should not cover with their buildings more than one third of the area granted to them respectively, were addressed to the future purchasers of the surrounding lots as the basis on which those lots were to be sold, and the lots of the plaintiffs having been bought on the faith of these declarations, an equitable contract was created which could be enforced specifically as a restriction on the land held by the defendant, and that the plaintiffs were entitled to decrees enjoining the defendant from erecting any building or buildings covering more than one third of the area assigned to it by St. 1861, c. 183. *Wilson v. Massachusetts Institute of Technology*, 565.

### EQUITY JURISDICTION.

#### *Laches.*

1. Although a plaintiff after filing a bill in equity delays more than six years before filing an amendment which is necessary to complete his right to relief, and delays more than four years after a master's report has been made in his favor before setting it down for confirmation, yet, if the



defendant at any time could have brought the case to trial and has failed to do so, he cannot object on the ground of laches to a decree awarding costs to the plaintiff. *Hill v. Fuller*, 195.

2. Where three persons have bought land in common for the purpose of cutting it into lots and putting it upon the market, and, for convenience in managing the property and making conveyances, one of the owners in common conveys his share in fee to the other two, retaining an equitable interest under an agreement in writing by which all three agree to "make use of their best skill and exertions to make sale of said real estate", if after the lapse of a year the one who has conveyed his share, instead of contributing his services to the development of the undertaking, voluntarily ceases to participate in it and makes an assignment of his interest through a third person to his wife, goes into bankruptcy, and shortly thereafter removes from the Commonwealth and for twenty-nine years fails to make any exertions, or interest himself in any manner in making sales of the land, he has lost his equitable rights by laches, so that after this lapse of time his assignee cannot enforce the original trust created by the agreement in writing or compel an accounting by the assignor's former associates to whom he conveyed his share in the land. *Sawyer v. Cook*, 163.

Bill in equity to remove cloud on title consisting of equitable interest which has been lost by laches, see *post*, 5.

Right to costs notwithstanding delay of four years and eight months, see EQUITY PLEADING AND PRACTICE, 6.

Collusion of officers of corporation explaining its acceptance of false accounts during long period, see *post*, 8.

#### *Acquiescence.*

Corporation does not lose by acquiescence right to avoid purchase of property sold to it by its promoters where the directors and stockholders acquiescing are the promoters themselves and persons under their control, see CORPORATION, 6.

#### *Contribution.*

3. If property given by one of two joint debtors is accepted at a valuation as payment of the joint indebtedness that indebtedness is ended, and a bill in equity by the debtor who gave the property will lie against the other for contribution. *Hill v. Fuller*, 195.
4. The fact that a portion of a joint debt remains unpaid is no defence to a suit in equity by one of two joint debtors who has paid the principal portion of the debt against the other for contribution, where the collection of the portion of the debt unpaid is barred by the statute of limitations and the creditor has acquiesced in a practical ending of his claim. *Ibid*.

#### *To remove Cloud on Title.*

5. A bill in equity may be maintained to remove a cloud from the title to land consisting of an equitable interest appearing of record which the holder has lost the right to enforce by reason of laches. *Sawyer v. Cook*, 163.



*To compel Restitution by Fiduciary.*

6. This court has jurisdiction in equity to compel the restitution of money taken in violation of a fiduciary duty. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 815.

*To compel Restitution by Promoters of Corporation.*

Where promoters sell property to corporation at large profit without disclosure of material facts, corporation may compel restitution of consideration or recover damages for equitable tort, *see CORPORATION*, 8.

Bill by corporation to compel restitution of consideration for property sold by promoters to it may be maintained against surviving promoter although title to property was in deceased promoter not made party to suit, *see CORPORATION*, 7.

Corporation does not lose by acquiescence right to avoid purchase of property sold to it by its promoters where the directors and stockholders acquiescing are the promoters themselves and persons under their control, *see CORPORATION*, 6.

*To redeem from Pledge.*

Redemption of mortgages pledged and proceeds of mortgage foreclosed by pledgee, *see PLEDGE*.

*To recover Property fraudulently transferred by Agent.*

7. A woman who executes and acknowledges a discharge of an old mortgage and an assignment of a new one, representing the investment of all her savings, because she has implicit confidence in her legal adviser and without reading the instruments or understanding their purport, and entrusts all the papers including the mortgage note indorsed in blank to the possession of her legal adviser, if her legal adviser sells the mortgage and absconds with the proceeds, has no remedy in equity against the persons who have purchased the mortgage from him in good faith or against a trust company to which the mortgage has been assigned as security for an advance of the purchase money. *Callahan v. Mercantile Trust Co.* 593.

*To surcharge and falsify Accounts.*

8. A bill in equity by a corporation against the members of a firm of brokers, alleging that the defendants acted as fiscal agents for the plaintiff for a series of years and rendered monthly accounts which were received by the plaintiff without objection by reason of fraud, collusion and conspiracy on the part of the managing officer of the plaintiff who controlled its other officers in the acceptance of the accounts, and that the accounts were false and fraudulent in many particulars alleged, and praying that the accounts be opened, or that they be surcharged and falsified to rectify the frauds and errors therein, is good on demurrer as setting forth ground for equitable relief. *Bay State Gas Co. v. Lawson*, 502.



*To enjoin Nuisance.*

Test of existence of nuisance is effect of things complained of on ordinary persons, see NUISANCE, 1.

Keeping hens under cleanly conditions near dwelling of another may not be nuisance, see NUISANCE, 2.

*Res Judicata.*

Final decree dismissing bill is bar to another bill for same cause of action on different grounds, see RES JUDICATA.

*Suit by Minority Stockholder of Corporation.*

Minority stockholder in suit against officers controlling corporation need not allege demand on them for relief, see CORPORATION, 4.

## EQUITY PLEADING AND PRACTICE.

*Bill.*

1. In a bill in equity against one acting in a fiduciary relation to the plaintiff there is no inconsistency in a prayer for the rescission of a contract and a prayer for damages. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 815.

*Cross Bill.*

2. Where a defendant in equity files a cross bill stating a case entitling him to affirmative relief and the original bill is dismissed, the cross bill may be retained for the purpose of granting relief as if it were an original bill. *Callahan v. Mercantile Trust Co.* 893.

*Demurrer.*

3. An attempted demurrer to a part of a bill in equity may be treated as an assignment of a cause of demurrer to the whole bill. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 815.

*Parties.*

4. Where the officers of a corporation wrongfully have converted property of the corporation to their own use, the death of one of them, which would work a severance of the joint liability at law, does not prevent the executor or administrator of the deceased officer being joined as a defendant in a suit in equity against the officers to compel restitution of the property to the corporation, since in equity appropriate separate decrees may be made. *Von Arnim v. American Tube Works*, 515.
- Promoters liable severally as well as jointly for equitable tort in selling their property to corporation at large profit without disclosure of material facts, see CORPORATION, 8.

*Amendment.*

5. Under Chancery Rule 25 of the Supreme Judicial Court a fact occurring after the filing of a bill in equity which makes good the plaintiff's right to relief may be set up by amendment. *Hill v. Fuller*, 195.



Equity Pleading and Practice (*continued*).

Order in rescript of "Bill dismissed" and docket entry in pursuance thereof do not constitute final decree, and plaintiff may amend bill thereafter into action at law, *see post*, 9.

*Costs.*

6. The plaintiff in a suit in equity by one of two joint debtors against the other for contribution is none the less entitled to costs because he delayed the filing of his bill four years and eight months. *Hill v. Fuller*, 195.

*Probate Appeal.*

7. Probate appeals are on the equity side of the court and are governed by the rules of practice in equity so far as they are applicable. *Crocker v. Crocker*, 16.
8. When on an appeal from the Probate Court issues are framed for a jury by a justice of this court the verdict of the jury if not set aside by the justice is conclusive upon the issues of fact. *Ibid.*

*Final Decree.*

9. An order in a rescript of this court of "Bill dismissed" and a docket entry in the Superior Court in pursuance of it do not constitute a final decree, and the plaintiff thereafter may be allowed by the Superior Court to amend by changing his suit in equity into an action at law. *Crossman v. Griggs*, 156.

Final decree dismissing bill is bar to another bill for same cause of action on different grounds, *see RES JUDICATA*.

**ERROR, WRIT OF.**

A writ of error lies to vacate a judgment rendered on default after insufficient service on the defendant. *Porter v. Prince*, 80.

Writ of error lies to reverse judgment of Superior Court punishing criminal contempt of court, *see CONTEMPT*, 1, 2.

**ESTOPPEL.**

One who has assented to trustee's account is not estopped to claim under decree of Probate Court reforming account and ordering restitution of certain losses, *see TRUST*, 3.

Action of customer against electric light company for injuries from shock from wire illegally installed by plaintiff may be barred by the illegality unless company is estopped to set it up, *see ELECTRIC LIGHT COMPANY*, 2. Corporation does not lose by acquiescence right to avoid purchase of property sold to it by its promoters where the directors and stockholders acquiescing are the promoters themselves and persons under their control, *see CORPORATION*, 6.

**EVIDENCE.**

*Presumptions and Burden of Proof.*

1. A plaintiff does not sustain the burden of proof which the law imposes on him if the facts which he proves are as consistent with the defendant's view of the case as with his own. *Crowell v. Moley*, 116.



Where evidence to sustain oral contract to pay note of another is consistent with mere gratuitous promise, plaintiff has not sustained burden of proof, see **CONTRACT**, 1.

Presumption against spoliator of instrument that it was valid when destroyed, see **BILLS AND NOTES**, 3.

Continuance of condition of damaged automobile for seven months held properly inferred under certain circumstances, see *post*, 3.

In action under Pub. Sts. c. 112, § 213, for injuries at railroad crossing burden is on defendant to show gross negligence on part of plaintiff, see **RAILROAD**, 3.

In trial for murder burden is on prosecution to show beyond reasonable doubt that defendant was sane at time of homicide, see **HOMICIDE**.

#### *Competency.*

2. In an action for property alleged to have been obtained fraudulently by the defendant from the plaintiff's intestate when mentally incapacitated by inducing the intestate to sign orders for money in savings banks and a transfer of shares of stock, if the defendant has testified to the signing of the orders and the transfer of the shares and has introduced the testimony of other witnesses as to the intention of the intestate to give the property to the defendant, the presiding judge in his discretion may allow the plaintiff to call witnesses to testify to declarations of the intestate, made four or five years before the signatures, that the intestate intended her property to go to the plaintiff, who was her husband, and to a similar declaration made a few months before her death, such declarations being competent to throw light upon the condition of the intestate's mind at the time of signing the orders and transfer, and the limit of time being a matter which must be left largely to the discretion of the presiding judge. *Hagar v. Norton*, 47.

Evidence of general nature of defendant's business competent to show absence of wagering contracts, see **WAGERING CONTRACTS**, 2.

#### *Remoteness.*

3. On the issue of damages in an action for injuries to an automobile belonging to the plaintiff which was partially destroyed while in the possession of the defendant, it appeared, that after the machine had been returned to the plaintiff in its damaged condition it was sent as freight to Cleveland, Ohio, where seven months later it was examined by mechanical experts whose depositions as to the extent of the damage were admitted in evidence. The defendant excepted to the admission of the depositions on the ground that the plaintiff had not shown that the condition of the machine remained the same during the seven months before the examination. Held, that the plaintiff having shown the state of the machine when received from the defendant and when shipped to Cleveland, and there being no suggestion by the defendant of any change before the examination, the jury would be warranted in drawing from the whole evidence the inference of fact that the machine when seen and examined by the experts



*Evidence (continued).*

was in all respects unchanged. *White Sewing Machine Co. v. Phenix Nerve Beverage Co.* 407.

Evidence of declarations of intention of intestate four years before signatures which it is contended were obtained by fraud, see *ante*, 2.

*Opinion: Experts.*

4. In a trial for murder, where the defence is insanity, the restriction of the cross-examination of government experts upon the relative value and reputation of medical authorities who have written upon insanity is within the discretion of the court, and so is the exclusion of a hypothetical question on a ground of form. *Commonwealth v. Johnson*, 382.
5. In a trial for murder, where the defence is insanity, it is not necessary that experts testifying for the government as to the mental condition of the defendant should state the grounds or reasons for their opinions, the defendant having the opportunity to ask for the grounds of their opinions on cross-examination. *Ibid.*
6. In a trial for murder, where the defence is insanity, if the physical and mental history of the defendant and his family comes solely from the defendant's statements, letters and admissions or from his witnesses, and is accepted by the government as true, an expert for the government, who has made examinations of the defendant, may be asked whether from all his examinations and investigations, and from what he has heard in court, he has formed any opinion as to the mental condition of the defendant on the day of the alleged murder, and, on answering this question in the affirmative, and giving an opinion that the defendant was sane at that time, he can be asked further what is his opinion of the defendant's sanity at the time the question is put. *Ibid.*
7. On the trial of a petition under St. 1894, c. 548, § 8, for damages from the location, construction, maintenance and operation of the elevated railway of the Boston Elevated Railway Company, an expert who has given his opinion in regard to the amount of damage to the petitioner's property, may be permitted to testify that the building of the elevated railway had diminished the salability of property along the line, this being admitted as the statement of an effect which related to the petitioner's estate as well as to others, in support of the witness's previously expressed opinion on the subject of damages. *Logan v. Boston Elevated Railway*, 414.
8. On the issue of the value of land at Hyde Park on a bank of the Neponset River taken by the metropolitan park commissioners under St. 1893, c. 407, and St. 1895, c. 450, it is within the discretion of the presiding judge to refuse to allow a witness who never had lived in Hyde Park or bought or sold property there and was not shown to have special knowledge of values there, to testify as an expert as to the amount of the damage to the petitioner, although the witness was in the real estate business in Boston and had had experience as a civil engineer and as a builder and repairer of textile mills, and at one time had charge of a mill in New Hampshire and of another at Lawrence, was the owner of a manufacturing site in Everett, had built and sold a chemical factory at Newton Upper Falls on the Charles River, and had some knowledge as to the general value of



manufacturing property. Especially is such discretionary exclusion justified where the witness's testimony already given had shown that his opinion on the question of damages probably was affected by an erroneous view of the rights of the parties. *Klous v. Commonwealth*, 149.

*Admissions and Confessions.*

9. The answer of a city to a petition for damages for the taking of the petitioner's land for the improvement of a certain brook in admitting that lands were taken for that purpose does not admit that the lands were taken in fee. *Newton v. Newton*, 226.
10. On the trial of an indictment for uttering a forged check knowing it to be forged, evidence of the conduct and statements of the defendant is admissible to show his knowledge of the falsity of the check and his evil intention in passing it. For this purpose the testimony of the officer who arrested him as to the defendant's conduct and declarations immediately after he supposed that he had obtained the money on the false check is admissible. *Commonwealth v. Bond*, 91.

Certain admissions by language and conduct held sufficient to justify conviction for having in possession burglarious implements, see **BURGLARIOUS IMPLEMENTS**.

Failure of insurance company to reply to plaintiff's letter referring to its representative does not admit that person referred to was its adjuster, see **INSURANCE**, 2.

Voluntary repairing by landlord at request of tenant not admission of liability to repair, see **LANDLORD AND TENANT**, 8.

*Declarations of Deceased Persons.*

11. To make the declaration of a deceased person admissible under R. L. c. 175, § 66, the party offering it must satisfy the presiding judge not only that the statement was made in good faith but that it was made before the commencement of the action, and where this is not clear and no offer is made to show it, the judge is warranted in excluding the evidence. *Flynn v. Coolidge*, 214.
12. A declaration of a deceased person may be admitted under R. L. c. 175, § 66, although made in assent to a leading question if the question called for a fact within the personal knowledge of the declarant. *Nagle v. Boston & Northern Street Railway*, 38.
13. In an action by the widow of a motorman against the railway company by whom he was employed for his death alleged to have been caused by the starter of the defendant negligently giving him an order to proceed with his car on a single track without waiting for another car to pass him, in contravention of a general order, by reason of which he was killed by a collision, the starter denied that he gave any such order, and the conductor of the car of which the intestate was the motorman testified that as the car went upon the single track, proceeding toward a place called the Willows instead of stopping, he said to the deceased motorman "Jim, did you have orders to go to the Willows?" and that the deceased said "Yes" and nodded, and that after the collision when the conductor was



*Evidence (continued).*

in the ambulance with the deceased he said to him "Jim, did you get orders to go to the Willows?" and the deceased said "Yes, I did." The answers were objected to as not admissible under R. L. c. 175, § 66, because made in answer to leading questions and as merely embodying the declarant's inference as to what had been done or said by others. *Held*, that under the circumstances disclosed by the evidence the questions put by the conductor called for a fact within the personal knowledge of the deceased motorman and not for an inference to be made by him, and that the answers properly were admitted in evidence under the statute. *Nagle v. Boston & Northern Street Railway*, 38.

14. On an exception to the admission by a presiding judge of the declarations of a deceased person under R. L. c. 175, § 66, if the bill of exceptions does not state that the judge failed to make inquiry to ascertain the good faith of the declarant before admitting the declarations, such judicial action and a preliminary finding of the good faith of the declarant will be inferred from the admission of the evidence. *Dickinson v. Boston*, 595.
15. In an action against a city, begun as an action for injuries from a defect in a highway, where the plaintiff has died, and the action is prosecuted by her administrator, the declarations of the intestate, narrating the circumstances under which the accident occurred, are none the less admissible under R. L. c. 175, § 66, because they were made after the notice required by R. L. c. 51, § 20, had been given to the city, if they were made before the date of the writ. *Ibid*.

*Of Previous Inconsistent Statements.*

16. The provision of R. L. c. 175, § 24, that a party may impeach his own witness by proof that he has at other times made statements inconsistent with his present testimony, does not make the inconsistent statements thus introduced evidence of the truth of the matter stated. *Donaldson v. New York, New Haven, & Hartford Railroad*, 484.

*Of Previous Consistent Statements in Rebuttal.*

17. When a witness in an action of tort for personal injuries has been cross-examined at length in an attempt to show that the account of the accident given by him in his direct examination is a recent fabrication created under the influence of the attorney for the party calling him, that party may call as a witness a person employed to investigate the case when notice of the accident was received and show by him that the witness cross-examined had given the same account of the accident soon after it occurred. *Griffin v. Boston*, 475.

*Of Mental Condition.*

Evidence that plaintiff cried, "looked very bad" and did not sleep as well as before is admissible to show mental suffering, see *LIBEL AND SLANDER*. Evidence of declarations of intention of plaintiff's intestate four or five years before signatures, which it is contended were obtained by fraud by the defendant from the intestate when mentally incapacitated, and of other declarations made a few months before her death, see *ante*, 2.



*Of Damage to Real Estate.*

Witness excluded within discretion of presiding judge as expert upon value of land on bank of river taken by park commissioners, see *ante*, 8.

What expert may testify to in support of his opinion as to the amount of damage caused to certain real estate by the construction and operation of an elevated railway, see *ante*, 7.

*Medical Authorities.*

In trial for murder restriction of cross-examination of experts as to value of medical authorities is within discretion of court, see *ante*, 4.

*To refresh Recollection of Witness.*

Witness may refresh recollection from books which are not admissible in evidence, see WITNESS, 3.

## EXECUTION.

1. In this Commonwealth it can be shown and determined in a collateral action that an execution was void because issued contrary to law. *Washington National Bank v. Williams*, 108.

2. The provision of Pub. Sts. c. 171, § 15, that no execution shall be issued within twenty-four hours after the entry of judgment is for the benefit of the judgment debtor and can be waived by him. *Ibid*.

Whether certain agreement by poor debtor is waiver of Pub. Sts. c. 171, § 15, as to issue of execution is question of law, see POOR DEBTOR, 1.

Effect of debtor's agreement that execution be issued forthwith on poor debtor proceedings, see POOR DEBTOR, 2.

## EXECUTOR AND ADMINISTRATOR.

*Qualifications of.*

It cannot be held as matter of law that a person not a lawyer is unfit to act as executor because before the death of the testator he gave him unsound advice in regard to the management and disposition of property which the testator held as trustee under a will, nor on account of the mere fact that for a long time he knowingly concealed the will of the wife of the testator and all knowledge of it. *McGuinness v. Hughes*, 201.

Judgment in action on guardian's bond brought in name of judge of probate upheld although no executor appointed for deceased ward, see BOND.

Suits by and against, see SURVIVAL OF ACTIONS; BILLS AND NOTES, 3.

## FALSE IMPRISONMENT.

Questions of improper delay in taking to jail one arrested on tax warrant and improper treatment in placing him in cell of police station are for jury, see TAX, 10.



**FALSE PRETENCES.**

See LARCENY.

**FLATS.**

St. 1809, c. 95, § 2, contains no grant by Commonwealth to Lechmere Point Corporation of right to fill flats, see TIDE WATER.

**FORGERY.**

1. To sustain an indictment under R. L. c. 209, § 8, for uttering a forged check knowing it to be forged, if it appears that the defendant knew that the check was false and asserted its genuineness for the purpose of getting money, it is not necessary to show that the check was made by the defendant or that the person whom the defendant sought to deceive was in fact misled. *Commonwealth v. Bond*, 91.
  2. On the trial of an indictment under R. L. c. 209, § 8, for uttering a forged check knowing it to be forged, if the check when put in evidence bears the indorsement of the alleged payee which is not alleged in the indictment, this is not a material variance, as the indorsement constitutes no part of the crime with which the defendant is charged and need not be alleged or proved. *Ibid*.
- Conduct and statements of defendant admissible to show guilty knowledge and intention in uttering forged check, see EVIDENCE, 10.
- Under indictment for uttering forged check defendant may not for first time, on argument of exception to refusal to order an acquittal, show check to be void because dated on Lord's Day, see PRACTICE, CRIMINAL, 4.

**FRATERNAL BENEFICIARY ASSOCIATION.**

The charter of a fraternal beneficiary association, incorporated by a special law of another State, contained a provision that the beneficiary of a certificate should be specified only in the following order, (a) such person or persons of the immediate family of the member as by him designated, (b) such persons, in default of such family, of the blood relatives of the member as by him designated, (c) in default of any designation by the member, "or out of the order named," aid should be rendered by the corporation to such family or relatives of such member, "in manner above named." A member, being unmarried and living apart from his father and other relatives, designated his father as beneficiary. Later he married, and his wife was a member of his family until his death. He made no change in the designation. On his death the corporation paid the amount due on the certificate to his widow under a rule of the order made to carry out provision (c) of the charter. *Held*, that the payment was lawful, the provision in the charter for payment by the corporation in case of a designation "out of the order named" applying to a designation which origi-



nally was permitted but which by reason of the member's marriage and the consequent change in his family was at the time of his death a designation out of the order named. *Larkin v. Knights of Columbus*, 22.

### FRAUD.

*As against Creditors.*

In suit to set aside conveyance by bankrupt, defendant's independent title under foreclosure of mortgage found good, see **BANKRUPTCY**.

### GAS LIGHT COMPANY.

R. L. c. 110, § 76, obliging gas light company to leave streets it has dug up in as good repair as when opened, raises no obligation to repair entitling it to notice of injury under R. L. c. 51 § 20, see **WAY**, 10.

### GIFT.

No presumption of gift where man buys real estate and has it conveyed to housekeeper whom he has agreed to marry as soon as his wife obtains divorce from him, see **TRUST**, 7.

### GRADE CROSSING.

Certain contract of city with railroad to maintain gateman at crossing in consideration of withdrawal of opposition to laying out of highway there is valid where made in contemplation of order of county commissioners subsequently passed, see **MUNICIPAL CORPORATIONS**, 1.

### GRADE CROSSING ACT.

Liability of city for defect in way caused by railroad company during work of abolition of grade crossing under city permit to close street, see **WAY**, 5, 6.

### GUARDIAN.

Judgment for plaintiff sustained in action on guardian's bond brought in name of judge of probate although ward deceased and no executor or administrator appointed, see **BOND**.

### HANCOCK AVENUE.

Hancock Avenue at west of State House grounds is not street within St. 1892, c. 419, § 25, restricting height of buildings in Boston, see **WAY**, 1.

### HOMICIDE.

In a trial for murder in the second degree, where the defence was insanity, the judge in charging the jury, after reading to them a passage from the opinion in *Commonwealth v. Rogers*, 7 Met. 500, 501, further instructed



*Homicide (continued).*

the jury that a complete purpose or design to kill must be shown, and that the burden of proof was upon the Commonwealth to satisfy them beyond a reasonable doubt that the defendant was legally responsible at the time of the killing, or in other words was sane. *Held*, that this was a correct statement of the law. *Commonwealth v. Johnson*, 382.

Order in which defence of insanity shall be introduced in trial for murder is within discretion of court, see PRACTICE, CRIMINAL, 2.

In trial for murder restriction of cross-examination of experts as to medical authorities and exclusion of hypothetical question on ground of form are within discretion of court, see EVIDENCE, 4.

## HOUSEBREAKING.

Evidence held sufficient to show defendants guilty of having in possession implements designed for committing burglary under R. L. c. 208, § 41, see BURGLARIOUS IMPLEMENTS.

## HUSBAND AND WIFE.

Married woman may establish separate domicil for purpose of divorce only by proof that she separated from husband for justifiable cause, see MARRIAGE AND DIVORCE, 1.

## INSANITY.

In trial for murder burden is on prosecution to show beyond reasonable doubt that defendant was sane at time of homicide, see HOMICIDE.

Order in which defence of insanity shall be introduced in trial for murder is within discretion of court, see PRACTICE, CRIMINAL, 2.

## INSURANCE.

*Fire.*

## Insurable interest.

1. Under a policy of fire insurance in the Massachusetts standard form, one holding a chattel under a contract of conditional sale, by which the title is to pass when all instalments of the purchase money have been paid and in the meantime the purchaser is "to be held liable for loss or damage by fire or otherwise," if the chattel is destroyed by fire, may recover not only the amount of the instalments he has paid but also the amount of his liability in consequence of the destruction of the chattel by fire. *Ryan v. Agricultural Ins. Co.* 11.

## Sworn statement of loss.

2. In an action on a policy of fire insurance in the Massachusetts standard form, where the defence was the failure of the plaintiff to furnish seasonably the sworn statement of loss required by the policy, the plaintiff to show a waiver of this condition put in evidence a letter mailed by her to the defendant containing the following statements: "A man who said he



represented your company and the fire marshal from Springfield, Mass., came here three days after the fire and saw my husband and myself, but did not look at the things we saved or go to the farm where the fire occurred. We have left the few things which we were able to save here at Mr. Smith Jones for your agent to view them, but they have not done so. I am here on expense and would like to move the goods away. Can I do so. Please let me know at once." It appeared that the plaintiff received no answer from the defendant denying the authority of the man referred to in her letter as saying that he represented the defendant. *Held*, that the letter of the plaintiff contained no statement that the man referred to came as an adjuster of the loss and therefore the silence of the defendant was not an admission that he was such an adjuster. *Parker v. Farmers' Ins. Co.* 257.

3. In an action on a fire insurance policy, where the defence set up was the alleged failure of the plaintiff forthwith to render to the company a sworn statement of loss as required by the policy, it appeared, that the property insured consisted of household goods and furniture, that the fire occurred on November 26, that the company received notice of it within forty-eight hours and sent an adjuster with authority to adjust the loss, that the adjuster wrote to the plaintiff on December 7, asking for a written statement of loss, that between December 7 and December 19 an inquest was held by the fire marshal which was attended both by the plaintiff and the adjuster, that on December 19 the plaintiff signed and made oath to a written statement of loss in the form and with the particulars required by the policy, and delivered it to the defendant's agent who had issued the policy to the plaintiff, and who had no authority to adjust losses but had authority to receive proofs of loss for the purpose of forwarding them to the defendant, that with the consent of this agent the written statement immediately thereafter was taken away by the plaintiff for the purpose of making a copy of it, that the plaintiff returned the statement to the agent on February 23, no request appearing to have been made for it in the meantime, and thereupon it was sent to the defendant, which received it on March 15 and retained it without objection, and that more than a month afterwards the receipt of the statement of loss was acknowledged by the adjuster without making any objection to it. The judge hearing the case without a jury found that the defendant had waived a strict compliance with the condition of the policy, and found for the plaintiff. *Held*, that, taking all the circumstances into account, the court could not say that the finding of the judge that the defendant had waived a strict compliance with the condition was not warranted, and that what took place on December 19, when the plaintiff delivered the statement to the agent, could be found to have been a good delivery of the statement of loss to the defendant. *Walker v. Lancashire Ins. Co.* 560.

#### *Life.*

Condition in policy.

4. If a policy of life insurance provides that no obligation is assumed by the company unless at the date of the policy "the insured is alive and in  
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*Insurance (continued).*

sound health," the company is not liable if the insured dies from a mortal disease which he had at the date of the policy although he then appeared to be in sound health, and in an action on the policy an instruction that the plaintiff only need show that the insured at the date of the policy was in the same condition of health that he was in on the day that he made his application and was examined is erroneous. *Barker v. Metropolitan Ins. Co.* 542.

5. St. 1895, c. 271, now R. L. c. 118, § 21, relating to an "oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance" has no application to a condition in the policy itself. *Ibid.*

*Revival.*

6. The provision contained in R. L. c. 118, § 73, that "Every policy [of life insurance] which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence", does not require a copy of a revival application to be annexed to a policy revived after it has lapsed, and in an action on such a policy the insurance company can put in evidence the application for revival, although not attached to the policy, and show that the warranties contained in the application were broken by the plaintiff so that the revival never took effect. *Holden v. Metropolitan Ins. Co.* 212.

*Agreement for commissions.*

7. A contract in writing between a life insurance company and one of its agents provided, that, if the agency continued for one year and was not terminated by the company for a violation of the agreement by the agent, the agent should be entitled to renewal commissions on policies effected by him which accrued after the termination of the agency provided the agent should "not be engaged in the business of life insurance for any other company, in any capacity whatever, in the State of Massachusetts, during the maturity of said renewal commissions." The agent after more than a year of service was discharged by the company without cause, and within a month thereafter entered the employ of another life insurance company having its office in Boston. In an action by the agent on the contract for renewal commissions thereafter accruing on policies effected by him, it was *held*, that he could not recover, there being no agreement to pay him commissions on renewal premiums after he had entered the employ of a competitor. *Chase v. New York Ins. Co.* 271.

## INTEREST.

1. Where an amount of money recovered in an action at law was due before the writ was issued, the plaintiff is entitled to interest from the date of the writ unless something appears to take the case out of the general rule. *Davis v. National Ins. Co.* 299.
2. The facts, that after the bringing of an action at law to recover the



- amount due on a life insurance policy a suit in equity was begun in a court of the United States by other claimants of the insurance money in which the plaintiffs and the defendant were made parties, and the action at law was continued for a long time until the suit in equity was disposed of by a dismissal of the bill, afford no ground for refusing the plaintiff interest during the entire period from the date of his writ, if there was no injunction or order in the proceedings in the United States court to restrain the defendant from paying the debt according to its terms, and nothing to prevent the defendant from filing a petition of interpleader under St. 1886, c. 281, (R. L. c. 173, § 37,) admitting its liability, or from paying the money into court at any time it pleased. *Davis v. National Ins. Co.* 299.
8. Where the defendant in an action of contract has been summoned as trustee of the plaintiff in an action previously brought against the plaintiff and still pending, the plaintiff, if he prevails, is not entitled to interest from the date of his writ but only to the date of the service of the trustee process on the defendant. *Walker v. Lancashire Ins. Co.* 560.

#### INTERROGATORIES.

1. Orders allowing a party to whom interrogatories have been addressed leave to file further answers or further time in which to answer are within the discretion of the trial judge. *Spinney v. Boston Elevated Railway*, 80.
2. If a person to whom interrogatories are addressed declines to answer a question for one of the reasons for which he is permitted to decline to answer by R. L. c. 173, § 63, he must state the reason under oath in answer to the interrogatory in order to avail himself of the privilege. *Ibid.*
3. In an action against a street railway company for personal injuries alleged to have been caused by the negligence of the conductor of a car of the defendant in which the plaintiff was a passenger, the plaintiff cannot by interrogatories filed under R. L. c. 173, § 57, compel the defendant to disclose the contents of a report signed by the conductor and the motorman of the car containing an account of the accident and the names and addresses of the persons who were present. *Ibid.*

#### INTOXICATING LIQUORS.

Tort against police officer for taking away and opening safe without consent of owner under search warrant for intoxicating liquors, see OFFICER.

#### JOINT TENANTS AND TENANTS IN COMMON.

1. The mere occupation by one of two tenants in common of the premises owned in common does not render him liable to his co-tenant in an action for use and occupation, but if there is an agreement to pay rent, although no amount is named, the tenant in possession may be held to account to his co-tenant for the reasonable rent of the property used and occupied by him. *Carroll v. Carroll*, 558.



*Joint Tenants and Tenants in Common (continued).*

2. Although, in the absence of an agreement on the subject, one of two tenants in common cannot charge his co-tenant a commission on rents collected as compensation for care of the property, yet an agreement to pay such a commission or compensation will be enforced. *Carroll v. Carroll*, 558.

### JOINT TORTFEASORS.

Breach of fiduciary duty by promoters of corporation makes them severally as well as jointly liable, see CORPORATION, 8.

### JUDGMENT.

*When conclusive.*

1. In an action on a bond to dissolve a mechanic's lien where no fraud or collusion appears a judgment establishing the lien is conclusive as to the debt thereby ascertained both against the principal and the surety. *Ruggles v. Bernstein*, 282.
2. If the purchaser of a business agrees to indemnify the vendor against all loss or damage upon any contracts relating to the business upon which the vendor is liable, a judgment obtained against the vendor, in an action brought by the manager of the business for salary for a period after the sale, is not binding on the purchaser if the vendor gave him no notice to come in to defend the action. *Busell Trimmer Co. v. Coburn*, 254.

*Vacation of.*

Writ of error lies to vacate judgment rendered on default after insufficient service, see ERROR, WRIT OF.

### JURY AND JURORS.

Finding of judge on motion for new trial that certain jurors were awake during trial and heard all material evidence is final, see PRACTICE, CIVIL, 14.

### LABOR UNION.

- Inducing employer to discharge workman because he does not belong to labor union is actionable, see MALICIOUS INTERFERENCE, 1.
- Agreement of employer with labor union as to discharge of non-union men does not alter rights of non-union workman discharged at request of agent of union, see MALICIOUS INTERFERENCE, 3.
- Validity of clause in invitation for proposals for municipal contract and in contract itself as to payment of union scale of wages by contractor, see CONTRACT, 4.

### LANDLORD AND TENANT.

*Liability of Landlord to Tenant.*

1. A landlord owes no duty to his tenant or a member of the tenant's household to make repairs unless he has agreed to do so, and where he has



made such an agreement he is not liable for a want of repair of which he has received no notice. *Cummings v. Ayer*, 292.

2. A girl living with her father and mother in a tenement on the third floor of a building, who is injured by a fall caused by the breaking of the railing of a platform of the tenement while she is taking in clothes from a line attached to the railing, is in no better position as regards the liability of the landlord than either of her parents would have been if injured in like manner. *Phelan v. Fitzpatrick*, 237.
3. If a landlord on one occasion at the request of a tenant voluntarily undertakes with a hammer and nails furnished him by the tenant to repair the railing of a platform extending from the tenement, this is not an admission of liability on the part of the landlord in case the tenant or her daughter afterwards is injured from the railing giving way. *Ibid.*
4. The principle, that in the absence of an agreement on the subject a landlord is under no obligation to his tenant to put the premises in better condition than they were at the time of the letting, applies to a defective railing of a platform attached to a tenement on the third floor of a building and used by the tenant for storing fuel, hanging out clothes and other purposes, although staircases to and from the platform are used generally by the tenants in the building in passing between their several tenements and the yard below. *Ibid.*
5. If the proprietor of a tenement house, who owns an adjoining building with a flat roof a portion of which is fenced off and floored with wooden boards and is used by the tenants as a place for drying clothes and for children to play, temporarily removes a part of the fence for the purpose of repairing the roof outside of the enclosure, and if a child six years of age after playing with other children on the roof falls through a skylight beyond the enclosure, the proprietor is not liable for the injuries suffered by the child, who is a trespasser or at most a mere licensee, the proprietor owing him only the duty not to injure him wantonly or to set a trap for him. *Dalin v. Worcester Consolidated Street Railway*, 344.

*Liability of Lessees on Covenant.*

To pay rent.

6. A provision in a lease, that in case the lessor has entered for a breach of condition he may let the premises to another at the risk of the lessee holding him responsible for the rent but crediting him with sums actually realized, has no application to the liability of the lessee for rent accruing before the entry, and it is no defence to an action for such back rent, that the lessor by making a new lease after entry for breach of condition has received more rent for the whole period of the first lease than he would have received had there been no breach of condition by the original lessee. *Richardson v. Gordon*, 279.

To pay taxes.

7. In an action on a covenant in a lease to pay "all taxes and assessments, to which the premises or any part thereof may become liable during said term," if it appears that the defendant failed to pay taxes assessed on the premises for the term of the lease, whenever payable, and that the prem-



*Landlord and Tenant (continued).*

ises had been sold for non-payment of taxes for one of the years of the term, the plaintiff is entitled to recover without showing that he has paid the taxes or that he has redeemed the property from the tax sale. *Richardson v. Gordon*, 279.

*Not to increase fire risk.*

8. A lease contained a covenant that "no act or thing shall be done upon the said premises, which may make void or voidable any insurance of the said premises or building against fire, or may render any increased or extra premium payable for any such insurance." The lessee who was engaged in the varnish business put into the insured building large tanks for the storage of varnish. Later the insurance rate on the building was raised on account of the presence of the tanks of varnish, and the lessor having paid the extra premiums sued the lessee on the covenant. *Held*, that the plaintiff could recover the amount of the extra premiums thus paid by him, even if when he made the lease he had known the extent of the defendant's business and his manner of conducting it elsewhere by storing varnish in large tanks, there being nothing to limit the application of the covenant to risks incurred by a change in the defendant's manner of conducting his business. The plaintiff was not shown to have known these things. *King v. Murphy Varnish Co.* 66.

*Liability of Lessee to Third Person.*

9. The lessee of an entire building sublet to various tenants is under an obligation to a master teamster directing the unloading of a truck load of goods for delivery to one of the tenants to have the premises reasonably safe for such a lawful purpose. *Wright v. Perry*, 268.

*Co-tenants.*

Liability of one tenant in common to co-tenant for rent for premises occupied by him under agreement with co-tenant, see **JOINT TENANTS AND TENANTS IN COMMON**, 1.

**LARCENY.***Sentence for Attempt to commit.*

Under R. L. c. 215, § 6, cl. 4, by which the punishment for an attempt to commit a crime cannot exceed one half the punishment provided for the crime itself, a person convicted of an attempt to commit larceny from the person can be sentenced under R. L. c. 208, § 24, for two and one half years in the house of correction. This is not affected by the indeterminate sentence act now contained in R. L. c. 220, § 20. *Commonwealth v. O'Neil*, 330.

*Venue.*

Larceny can be prosecuted only in county in which defendant has had possession of property alleged to have been stolen, see **PRACTICE, CRIMINAL**, 1.

**LECHMERE POINT CORPORATION.**

St. 1809, c. 95, § 2, contains no grant by Commonwealth to that corporation of right to fill flats, see **TIDE WATER**.



## LIBEL AND SLANDER.

In an action of tort for slander, evidence that the plaintiff cried, that she "looked very bad" and did not sleep as well as before, is admissible to show mental suffering. *Finger v. Pollack*, 208.

## LICENSE.

The \$2 required by St. 1903, c. 473, to be paid for the registration of an automobile is a license fee and not a tax. *Commonwealth v. Boyd*, 79.

Guilt under R. L. c. 102, § 1, of one assuming to act under victualler's license, taken out in name of another without intention to violate statute, see COMMON VICTUALLER.

Child of tenant playing on roof outside of enclosure held mere licensee, although part of fence around enclosure removed, see LANDLORD AND TENANT, 5.

Duty of lessee of building sublet to various tenants to have premises reasonably safe for delivery of goods to tenant, see LANDLORD AND TENANT, 9.

## LIMITATIONS, STATUTE OF.

In case of resulting trust statute does not begin to run against equitable owner until legal owner repudiates trust, see TRUST, 8.

Presumption against spoliator of instrument that it was not barred by statute of limitations when destroyed and is enforceable by administrator of owner in action brought within two years of his appointment, see BILLS AND NOTES, 3.

## LIS PENDENS.

Where a plaintiff, after bringing an action at law, begins by writ a suit in equity involving the same claims, and is allowed to amend his suit in equity into an action at law in which he obtains a finding, and at first is awarded the full amount of his claim, but later is allowed to discontinue his action as to certain items which are in excess of the *ad damnum* of his writ, and the finding is reduced to the sum named in the writ, the plaintiff still may recover in his first action at law the items as to which he has discontinued his second action amended from the suit in equity. *Crossman v. Griggs*, 217.

## LORD'S DAY.

Under indictment for uttering forged check defendant cannot for first time in argument of exception to refusal to order acquittal show check to be void because dated on Lord's day, see PRACTICE, CRIMINAL, 4.

## MALICIOUS INTERFERENCE.

1. Inducing an employer to discharge a workman because he does not belong to a certain labor union is actionable in tort as an unjustifiable interference with a contract. *Berry v. Donovan*, 353.



*Malicious Interference (continued).*

2. It is no defence to an action of tort for maliciously causing the discharge of the plaintiff by his employer that the plaintiff's employment was terminable at the will of his employer, that fact being material only upon the question of damages. *Berry v. Donoran*, 353.
3. If a manufacturer makes an agreement with a labor union that he will not retain any worker in his employ after receiving notice from the union that such worker is objectionable to the union for any cause, whatever rights this agreement may give the contracting parties in relation to each other, it does not justify an agent of the union in demanding and procuring the discharge of a workman by the manufacturer because the workman is not a member of the union, and if he does so he is liable to the workman in damages. *Ibid.*

## MALICIOUS PROSECUTION.

*Malice.*

In an action for alleged malicious prosecution in causing the arrest of the plaintiff for larceny after the issuing of a warrant to search the plaintiff's premises, the defendant, for the purpose of meeting the charge of malice, offered to show by the police officer who served the search warrant, that after the witness had searched the plaintiff's premises and had found that most of the articles mentioned in the warrant had been returned, the defendant inquired of the witness whether he ought to continue under the warrant, and also asked the witness's advice as to whether he should proceed under the warrant. The evidence was excluded. *Held*, that no error appeared in the exclusion of this evidence, as the defendant's questions to the officer had in themselves no bearing on the issue of malice and it did not appear what answer the officer made to them. *Flynn v. Coolidge*, 214.

## MANDAMUS.

1. A petition of six taxpayers and citizens of a city for a writ of mandamus is not the proper remedy to determine whether, as alleged in the petition, the duty of caring for the public schoolhouses of the city belongs to the school committee and has been usurped by the mayor and city council, or whether it legally is vested in the last named public officers. *Fowler v. Brooks*, 64.
  2. A petition for a writ of mandamus is the proper remedy to compel a city to proceed with the construction of a street alleged to have been unreasonably delayed after having been begun, but the issuing of the writ is a matter of judicial discretion. It was assumed in this case, without deciding it, that a city also could be compelled by mandamus to discontinue a street, but here no such situation was disclosed as required the court to compel the city to proceed with the construction of the street in question or to discontinue it. *McCarthy v. Street Commissioners*, 338.
- Municipal officer who has been removed cannot maintain mandamus for reinstatement on ground of invalidity of ordinance under which he was removed if he was appointed under same ordinance, see MUNICIPAL CORPORATIONS, 7.



## MARRIAGE AND DIVORCE.

1. A married woman, to establish a right to a separate domicile for the purpose of maintaining a suit for a divorce in this Commonwealth under the provisions of R. L. c. 152, § 5, must prove affirmatively that she separated from her husband for a justifiable cause, and if she fails to sustain the burden of proof her domicile is held to follow that of her husband. *Kendrick v. Kendrick*, 550.
2. A decree of divorce obtained in another State is none the less valid here because in the libel and notice the libellee was called Bertha whereas her true name was Bethiah, if she was known by both names, and a finding that she was known by both names is justified if it appears that she was addressed by her husband as Bertha and in the family at least was known by both names. *Ibid*.

## MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

Equitable restriction against erecting any building or buildings covering more than one third of the area assigned to that corporation by St. 1861, c. 188, see EQUITABLE RESTRICTIONS.

## MASTER AND SERVANT.

It is not within the scope of the employment of a conductor of a street railway company to call a policeman as a practical joke to arrest "two crooks" in an old car used as a place of shelter for conductors when off duty. *Berry v. Boston Elevated Railway*, 536.

For other cases on this subject relating to employer's liability both under the statute and at common law, see NEGLIGENCE, 35-57.

## MAXIMS.

"*Contra spoliatorem omnia præsumuntur.*" See *Sullivan v. Sullivan*, 380, 381.

## MECHANIC'S LIEN.

1. One who has furnished labor and materials for a building under an express contract with the owner, if he has failed to perform the contract substantially, cannot establish a lien under R. L. c. 197, for the value he has added to the real estate of the owner by the labor and materials he has furnished, as he could if he had performed the substance of the contract. *Burke v. Coyne*, 401.
2. If a contract is made to build a house for a person who has not yet acquired the land on which it is to be built, and if that person on subsequently purchasing the land simultaneously gives a mortgage back to secure the purchase money, and then allows the building of the house to go on until completed under the contract made by him before he bought the land, under Pub. Sts. c. 191, § 5, the contractor who built the house can establish no lien for the labor and materials which will be good



*Mechanic's Lien (continued).*

against the mortgagee who has recorded his mortgage. *Rockford v. Rockford*, 108.  
 Judgment establishing lien is conclusive on principal and surety on bond to dissolve lien in absence of fraud or collusion, see JUDGMENT, 1.

## MEDFORD.

St. 1900, c. 196, authorizing abandonment of certain land previously taken by park commissioners is unconstitutional, see CONSTITUTIONAL LAW, 7.

## METROPOLITAN PARK COMMISSION.

Rule forbidding business signs near parkway not a reasonable regulation, see CONSTITUTIONAL LAW, 9.

## MORTGAGE.

*Of Real Estate.*

Under Pub. Sta. c. 191, § 5, mortgage given back to seller on purchase of land, and recorded, prevails over mechanic's lien based on claim under building contract signed before date of deed or mortgage, see MECHANIC'S LIEN, 2.

Certain title under foreclosure sale held independent of and superior to rights of trustee in bankruptcy of mortgagor, see BANKRUPTCY.

*Attachment of Mortgaged Personal Property.*

Inadvertently overstating amount of mortgage debt in demand by mortgagee on attaching creditor under Pub. Sta. c. 161, § 75, may make demand void, see ATTACHMENT, 4.

Mortgaged personal property in hands of mortgagee for foreclosure cannot be attached on a writ against the mortgagor as if unincumbered under R. L. c. 167, § 74, see ATTACHMENT, 2, 3.

Mortgaged personal property in hands of bailee of mortgagor cannot be attached by summoning bailee by trustee process, see TRUSTEE PROCESS.

Discussion by LORING, J. of statutory methods of attaching mortgaged personal property, see *Jenness v. Shrieves*, 70.

Retention by mortgagor, as agent of mortgagee, of chattels sold to mortgagor under contract of conditional sale is conversion for which action is maintainable without previous demand, see CONVERSION.

Redemption of mortgages pledged and of proceeds of mortgage foreclosed by pledgee, see PLEDGE.

## MUNICIPAL CORPORATIONS.

*Contracts.*

1. A city may make a valid contract with a railroad company that in consideration of the railroad company withdrawing its opposition to the lay-



ing out of a highway at grade under Pub. Sts. c. 112, § 125, across the railroad of the company, the city will pay the expense of erecting gates and maintaining a gateman at the crossing, if the agreement is made in contemplation of the authorization by the county commissioners of the laying out of the highway across the railroad and such authorization subsequently is given by an order of the county commissioners adjudging that the public safety requires the erection of gates at this crossing and a person to open and close them, as the expense may be regarded as "incident to constructing and maintaining the way at such crossing," and thus an expense for which the city is liable under Pub. Sts. c. 112, § 128, until or unless it is otherwise determined by an award of a special commission. *Old Colony Railroad v. New Bedford*, 234.

Validity of clause in invitation for proposals for municipal contract and in contract itself as to payment of union scale of wages by contractor, see CONTRACT, 4.

#### *Liabilities.*

2. The city of Worcester is not liable for the negligence of its servants or agents in performing the public duties imposed on that city by St. 1886, c. 331, establishing a system of sewage disposal in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone River. Following *Harrington v. Worcester*, 186 Mass. 594. *Rome v. Worcester*, 307.

Liability of city for defect in way caused by railroad company in abolition of grade crossing working under city permit to close street, see WAY, 5, 6. For other cases relating to liability for defect in way, see WAY, 3-10.

#### *Officers and Agents.*

3. Discussion by KNOWLTON, C. J. of the liability of officers and agencies of government for negligence in the performance of public duties. *Moynihan v. Todd*, 301.
4. A municipal officer is not exempt from liability for acts of personal misfeasance in the performance of a public duty. *Ibid.*
5. If the superintendent of streets of a town is personally negligent in superintending the blasting of a rock in a highway, he is liable to one who in the exercise of due care is injured from being struck by pieces of the rock. *Ibid.*
6. No general statutory duty is imposed on cities or towns in this Commonwealth to light their streets for any purpose, and if a city lights its streets as a matter of convenience and safety for those having occasion to use them at night, and by an ordinance directs its superintendent of lamps to keep and maintain all lamp posts in repair, the superintendent of lamps in the performance of this duty becomes the servant of the city for whose negligence in the maintenance of the posts it is responsible. *Dickinson v. Boston*, 595.
7. A chief of police appointed under an ordinance of a city providing that the chief of police shall hold his office during the pleasure of the board of aldermen, if he is removed by the board of aldermen without a hearing,



*Municipal Corporations (continued).*

cannot maintain a petition for a writ of mandamus to compel his reinstatement on the ground that the provisions for removal in the ordinance under which he was appointed are contrary to the provisions of the charter of the city, for if the ordinance is invalid his appointment was illegal. *Cunningham v. Mayor of Cambridge*, 556.

*Street Lighting.*

No general statutory duty imposed on cities or towns to light their streets, see *ante*, 6.

*Schoolhouses.*

Mandamus not proper remedy to determine whether duty of caring for schoolhouses belongs to school committee or to mayor and city council, see *MANDAMUS*, 1.

*Street Railway Location.*

Selectmen may insert in street railway location condition as to repairs of public ways more onerous than imposed by general laws, see *STREET RAILWAY*, 5.

Condition in location granted street railway company under R. L. c. 112, § 7, regulating fares is invalid but condition requiring lighting of location is valid, see *STREET RAILWAY*, 3, 4.

Under certain condition in street railway location providing for change in material of track selectmen may order certain change in weight and kind of rails used, see *STREET RAILWAY*, 9.

Provision of St. 1898, c. 578, § 18, as to ratification of street railway locations theretofore granted, see *STREET RAILWAY*, 8.

Condition in street railway location as to reconstruction of track and roadbed held valid, see *STREET RAILWAY*, 7.

Certain condition in street railway location as to maintenance and repair of highway held valid, see *STREET RAILWAY*, 6.

**MURDER.**

See *HOMICIDE*.

**NAME.**

Service on one Bethiah as Bertha held valid where she was known by both names, see *MARRIAGE AND DIVORCE*, 2.

Release of all claims under R. L. c. 99, signed by one under fictitious name construed to cover claim arising out of previous transactions conducted under his own name, see *RELEASE*.

**NEGLIGENCE.***Contributory Negligence and Due Care.*

Of one in wagon loaded high with boxes, so that he could not see car behind him, driving across street railway track after listening, see *post*, 22.



- Of driver approaching street railway track from intersecting street where view is obstructed, *see post*, 20.
- Of one driving across street railway track after seeing car about three hundred feet behind him, *see post*, 14.
- Of one struck from behind by car while driving cart on narrow dark road with one wheel between rails of street railway track, *see post*, 13.
- Of one struck from behind by electric car while riding bicycle near track, *see post*, 24.
- Of one struck by electric car which he sees approaching while riding bicycle on pathway next to track, *see post*, 23.
- Of child crossing street railway track in front of approaching car, *see post*, 25.
- Of child crossing street without looking at approaching team, *see post*, 27.
- Of one struck by car while stooping over on street railway track, *see post*, 18.
- Of carpenter struck by electric car while stooping down repairing flooring of bridge, *see post*, 19.
- Of one riding bicycle struck by gate being lowered at railroad crossing, *see post*, 5.
- Of switchman injured by breaking of step on car on which he jumped, *see post*, 53.
- Of motorman obeying order of starter to proceed on single track on which car was to come in opposite direction, *see post*, 15.
- Of motormen running cars at rate of eight miles an hour in opposite directions on single greasy track in thick fog, *see post*, 16.
- Of motorman proceeding under general order on single track notwithstanding knowledge of repeated violations of order by cars coming in opposite directions, *see post*, 17.
- Of one falling into open trench at night in unlighted street, *see* WAY, 7.
- Of one attempting to ride bicycle between wagon and excavation in street, *see post*, 26.
- Of boy operating elevator which he knows is not in good order, *see post*, 40.
- Of one stepping into elevator well in reliance on defective automatic gate which falsely indicates presence of elevator, *see post*, 33.
- Of operative putting hand under blade of machine after stopping it knowing that it has been repaired recently, *see post*, 55.
- Of one injured by contact with electric light wire hanging over gutter, *see post*, 32.
- Due care of brakeman not inferred in absence of evidence as to cause of accident, *see post*, 4.

*Gross.*

1. To establish gross negligence on the part of a defendant, the plaintiff must show intentional conduct of the defendant having a tendency to injure others which is known or ought to be known to the defendant, accompanied by a wanton and reckless disregard of its probable harmful consequences. *Banks v. Braman*, 367.
2. Where the liability of a defendant depends upon showing gross negligence



*Negligence (continued).*

it must be explained clearly to the jury that the negligence to be shown is different in kind not merely in degree from a lack of ordinary care. *Banks v. Bruman*, 367.

In action against railroad company under Pub. Sta. c. 112, § 213, burden of showing gross negligence of plaintiff is on defendant, see RAILROAD, 3.

*Proximate Cause.*

3. In an action for the destruction by fire of a temporary building and goods of the plaintiff therein through the alleged negligence of the defendant, it appeared that the defendant was a corporation engaged in the construction of a public work, and that the plaintiff had procured Italian laborers for the defendant's service and had erected the temporary building on land of another person near the work, fitted it with bunks for the workmen to sleep in, and in a part of it kept goods which by an agent he sold to the workmen, that as winter came on the men required a stove and the defendant's foreman, either with or without the knowledge and assent of the plaintiff, put in a stove in which the workmen built fires for themselves with fuel of the defendant, that about one hundred feet away from the temporary building was a storehouse of the defendant in which barrels of oil and gasoline were kept, used by the workmen for filling torches which they required for work in a tunnel, that the workmen helped themselves to the gasoline to use in kindling fires in the stove, and in so using it caused the fire which destroyed the plaintiff's property. It further appeared that the defendant's foreman had told the plaintiff's agent that he must stop the kindling of fires with gasoline and directed the employee in charge of the gasoline to prevent the workmen from getting it to use in the stove. *Held*, that, assuming that the act of the defendant's foreman in putting in the stove was not assented to by the plaintiff and might be treated as an uncondoned trespass, this was the remote and not the proximate cause of the destruction of the plaintiff's property by fire, and that if the defendant was negligent in keeping the gasoline in barrels in a storehouse one hundred feet away and not under lock and key, this also was not the direct cause of the plaintiff's loss, the wrongful act of the workmen in taking the gasoline and their subsequent negligence in its use having intervened. *Bellino v. Columbus Construction Co.* 480.

Where workman is injured by fall from giving way of ladder with defective fastening tied together by workmen with defective rope, negligence of fellow workmen in use of defective rope, and not original defect of fastening, is proximate cause of injury, see *post*, 56.

*On Railroad.*

4. In an action under St. 1887, c. 270, § 2, by the widow of a brakeman against the railroad company employing him for negligently causing his death, it appeared, that as the train on which the deceased worked came into a station of the defendant a man in the uniform of an employee of the defendant was seen standing on the front platform of the forward car where the deceased usually stood, that after the train stopped the deceased was found lying on the ground between the forward car and the tender of



the engine with his head crushed and that he died soon after without regaining consciousness, that the deceased was an experienced brakeman, that it was his duty to couple and uncouple the engine and cars, but that it also was a part of his duty to let the conductor or engineer know if he went between the cars. *Held*, that there was no evidence from which a jury fairly could infer the cause of the accident or on which they could find that the deceased was in the exercise of due care. *Donaldson v. New York, New Haven, & Hartford Railroad*, 484.

*At Railroad Crossing.*

5. If the rider of a bicycle, when three hundred feet from a railroad crossing with four tracks over which trains pass very frequently, seeing the gates down dismounts and talks to a friend, and ten minutes later, after the gates have been raised and lowered again, sees them beginning to rise, the gateman raising them about two thirds up to allow two women to pass, and if in the meantime the bell of an engine attached to a train waiting near the crossing in full view of the bicycle rider begins to ring indicating that the train is about to start, and the rider mounting his bicycle rides toward the crossing looking on the ground straight ahead, and is struck on the head and knocked down by one of the gates while being lowered, he cannot be found to be in the exercise of due care. *Briggs v. Boston & Maine Railroad*, 463.

Railroad not bound to maintain gates at crossing sufficient to withstand runaway horse, see RAILROAD, 1.

Liability of railroad company under Pub. Sts. c. 112, § 213, for neglect to give signals required by law, see RAILROAD, 3.

*In Freight Yard.*

Brakeman in freight yard does not assume risk of injury from defect in freight car, see *post*, 39.

Conductor of freight train held authorized to order brakeman to couple hose between two cars, although train still in charge of switching crew, see *post*, 43.

*On Industrial Railroad.*

Liability of electrical company for injury to switchman through breaking of step on motor car within the yard of its works, see *post*, 53.

*On Elevated Railway.*

6. It is not the duty of an elevated railway company operating trains through a subway to warn persons about to pass from one car to another at a station in the subway that there is danger of stepping into the opening between the cars. *Falkins v. Boston Elevated Railway*, 153.

7. It is no evidence of negligence of an elevated railway company toward a passenger, that there is a space of from three to four inches between the floor of the doorway at which the passengers alight from each car of its trains and the platform to which they pass. *Willworth v. Boston Elevated Railway*, 220.



*Negligence (continued).*

8. It is no evidence of negligence of an elevated railway company toward a passenger, that while the passengers alighting from a greatly crowded car forming part of one of its trains were passing over an open space of from three to four inches between the car and the platform the guard on the platform told them "as he usually does" to "step lively" or "move quickly." *Willworth v. Boston Elevated Railway*, 220.

*In Construction of Elevated Railway.*

9. In an action by a workman employed by a sub-contractor to rivet steel upon a certain portion of the elevated structure of the Boston Elevated Railway Company then in process of construction under St. 1894, c. 548, against that company, for injuries caused by being thrown from a temporary platform, by loose planks of the platform on which the plaintiff was standing being knocked off by the trolley pole of an electric surface car of the defendant flying up and striking them as the car was passing around a curve, there was evidence that the trolley wire sagged, but that in running slowly around the curve, as all the motormen were ordered to do and as all of them previously had done, the trolley pole would not become disengaged, and that the car which caused the accident was running contrary to orders at an unusual rate of speed. *Held*, that the questions of the due care of the plaintiff and the negligence of the defendant were for the jury, and that it also was a question for the jury whether the plaintiff, knowing that the cars slackened their speed in passing over the curve, voluntarily assumed the risk of an accident from their running faster. *Wagner v. Boston Elevated Railway*, 487.

*On Street Railway.*

10. A street railway company is not liable to a person injured from stepping through a hole in a platform of an old discarded car used merely as a shelter for conductors when off duty. *Berry v. Boston Elevated Railway*, 536.
11. If the conductor of a street car while collecting fares negligently allows himself to be thrown by a jolt of the car against a passenger standing in the aisle of the car and holding on by a strap the railway company is liable to the passenger for injuries thus caused whether the conductor was competent or incompetent and whether or not the company reasonably might have known of his incompetency. *Spinney v. Boston Elevated Railway*, 80.
12. A street railway company may be found to be negligent in running an electric car down a slight grade on a track at the extreme right hand side of a narrow dark road after daylight so as to run down from behind an empty coal cart driven partly on its track. *Sexton v. West Roxbury & Roslindale Street Railway*, 139.
13. One driving an empty coal cart on a narrow dark road after daylight may be found to be in the exercise of due care in driving with one wheel between the rails of a single street railway track at the extreme right hand side of the road to avoid teams coming from the opposite direction although while doing so his cart is struck from behind by an electric car. *Ibid*.



14. In an action by the driver of a loaded furniture wagon against a street railway company for injuries caused by his team being run into from behind by a car of the defendant, if it appears that the plaintiff was driving on the left hand side of a street and, being obliged to cross the defendant's tracks to get to his destination, leaned out of his wagon, looked back and saw a car approaching about three hundred or three hundred and fifty feet away, and thereupon, judging it safe to turn his horses across the track, did so and almost immediately his team was struck by the car, which broke the pole and whiffletree and twisted the wagon around, throwing the plaintiff out, and then went two or three lengths beyond, having sounded no gong as it approached, there is evidence that the plaintiff was in the exercise of due care and that the defendant was negligent. *Wood v. Boston Elevated Railway*, 161.
15. In an action by the widow of a motorman killed by a collision against the railway company employing him for causing his death, it is a question of fact for the jury whether the plaintiff's husband was in the exercise of due care in obeying the order of a starter of the defendant to proceed on a single track on which a car was to come in the opposite direction without waiting for the car to pass him on a double track before starting on the single one as a general order of the defendant required him to do. *Nagle v. Boston & Northern Street Railway*, 38.
16. In two actions against a street railway company for the death of one motorman and injuries to another from a collision of their two cars running in opposite directions on the same single track, it is a question of fact for the jury whether it was negligent for the husband of the plaintiff in the one case and the plaintiff in the other to run their respective cars at the rate of eight miles an hour in a thick fog upon a single track which was greasy because of dampness and fallen leaves. *Ibid.*
17. In an action by a motorman against the railway company employing him for injuries from a collision of his car with another car of the defendant coming from the opposite direction upon the same single track, if it appears that a general order of the defendant had been in force for four days requiring the cars coming from the opposite direction to wait upon a portion of the road having a double track until the plaintiff's car should pass, and if it also appears that on three of the four days that the order had been in force it had been disobeyed by the persons in charge of the car coming from the opposite direction, it is a question of fact for the jury whether the plaintiff and the conductor of his car knew of such disobedience or reasonably supposed that in those instances special orders had been given for the car to proceed, and, even if they knew that the order had been disobeyed and had failed to report the disobedience, it still would be a question for the jury whether they were in the exercise of due care in proceeding under a general order requiring their car to make the trip it was making. *Ibid.*
18. If a man who wants to pull down one leg of his trousers, and who has at least the whole of a highway including a sidewalk for foot passengers to choose from for performing that act, selects for the purpose the track of a street railway near a corner from which an electric car may emerge



*Negligence (continued).*

at any moment and strike him in eight seconds, and, if while stooping in such a place for the purpose named with his foot three inches over the rail he is struck by a car before he looks up, he cannot be found to be in the exercise of due care. *Jordan v. Old Colony Street Railway*, 124.

19. A bridge carpenter employed with others by commissioners in patching the flooring of a bridge over which electric cars are running, if being between the sidewalk and the nearest rail of the track and stooping down on one knee near the track to mark a plank, he is struck in the face by the running board of an open electric car, which he would have seen approaching if he had looked up and which he would have heard approaching if he had stopped to listen, cannot be found to be in the exercise of due care. *Quinn v. Boston Elevated Railway*, 473.

20. It is evidence of due care on the part of a person who was driving a milk wagon at seven o'clock in the morning, returning from making his deliveries, that, as he approached an intersecting street on which street cars ran and of which his view was considerably obstructed by trees and buildings, he was driving slowly and that he looked and listened and did not see anything nor hear anything before he started to cross the intersecting street where he was struck by a car. *Orth v. Boston Elevated Railway*, 427.

21. Evidence that an electric car was moving at a high rate of speed as it approached an intersecting street, where the view of the street on which the car was running was considerably obstructed by trees and buildings, without ringing any warning bell or giving any equivalent signal of the approach of the car, is evidence of negligence on the part of the railway company, which a plaintiff whose team was run into by the car at the crossing has a right to have submitted to the jury if there also is evidence that the plaintiff was in the exercise of due care. *Ibid.*

22. In an action by a farmer for injuries from being thrown from his wagon loaded with boxes, by its hind wheels being struck by a car of the defendant as he was attempting to drive across its track, it appeared that the street was a sparsely settled country highway, that the night was dark but that the road was straight and level for several hundred feet behind him and that there were several electric lights suspended from an arm of a post over the highway, so that the plaintiff had reason to suppose that a motorman of an approaching car would see him and warn him, that on account of the height and width of his load the plaintiff from the seat of his wagon could not see a car behind him, that before starting to cross the track the plaintiff pulled up his horse, who had been travelling about three miles an hour, and stopped "about one half a minute" and listened, but heard no car nor gong, that he started his horse again and turned across the track, when with his horse and the front wheels of his wagon on the track he saw a car within nine or ten feet of him, that he "pushed his horse along" slapping the reins on his back, but the hind wheels of the wagon were struck by the car and the plaintiff was thrown to the ground. There was evidence that the gong of the car was not sounded. *Held*, that there was evidence of the plaintiff's due care to be submitted to the jury. *Shea v. Lexington & Boston Street Railway*, 425.



23. If one riding a bicycle on a highway, which on his left is occupied by the track of a street railway and on his right has been made temporarily unfit for bicycle travel by soft material recently put upon it, is proceeding with four other bicyclists riding in single file on a pathway less than two feet in width next to the nearer rail of the track, worn smooth by bicycles although not designed for their use, and if so proceeding he sees an open electric car approaching at a rate of speed of from ten to twenty miles an hour and failing to turn to the right in time one of the wheels of his bicycle is struck by the running board of the car throwing him off, he cannot be found to be in the exercise of due care so as to be entitled to maintain an action against the street railway company for injuries thus caused. *Dechene v. Greenfield & Turners Falls Street Railway*, 423.
24. In an action against a street railway company for personal injuries, there was evidence, that the plaintiff was riding on a bicycle so near the track of the railway that a car going in the same direction could not pass him without striking him unless he turned to the right, that his reason for riding there was that the portion of the street at his right had been muddy and "hadn't got smoothed down," that his handle bars were low and the plaintiff "was bent over pretty well and going straight ahead, and not turning in either direction," that a car struck him from behind and threw him off his wheel into the street, that as the car approached no gong was sounded, that the "car did not stop but went right on," that the plaintiff had reason to believe that he could be seen by a motorman at a distance of at least two hundred feet, and that when the plaintiff heard the noise of the approaching car it was going so fast that there was not time for him to get out of the way. *Held*, that the questions of the due care of the plaintiff and the negligence of the defendant were for the jury. *Kerr v. Boston Elevated Railway*, 434.
25. If a bright, intelligent boy five years and four months of age, sent on an errand which requires him to cross a street on which electric cars frequently are passing in both directions, having no reason for haste and when a car in plain sight is one hundred and twenty feet distant coming toward him with great speed, leaves the curbstone at a cross walk which he does not follow and taking a diagonal course goes at a gait faster than a walk to a point between the rails, and then attempts to dodge but is run over and killed by the car, in an action under Pub. Sts. c. 112, § 212, against the railway company for causing his death by the gross carelessness of its servants, it cannot be found that the boy exercised the degree of care reasonably to be expected from children of his age, and the action cannot be maintained. *Murphy v. Boston Elevated Railway*, 8.
- One ceases to be passenger on street car on alighting upon reserved space of grass in centre of street over which tracks are laid, see STREET RAILWAY, 1.
- Liability of proprietor of wagon left by driver so near street car track that passenger in car is crushed between car and horse, see *post*, 29.
- Not within scope of employment of conductor of street car to call policeman as practical joke to make arrest in old discarded car, see MASTER AND SERVANT.



*On Highway.*

26. A woman on a bicycle, who riding on the half of a city street which is open to travel while the other half is being excavated by a street railway company in laying a track, and seeing a furniture wagon with an overhanging load approaching attempts to pass between the wagon and the excavation and to avoid being struck by the load finds herself obliged to turn toward the excavation and falls into it, cannot be found to be in the exercise of due care so as to enable her to maintain an action against the city for injuries thus sustained, even if the absence of a barrier to guard the excavation constituted a defect in the highway. *Harvey v. Malden*, 133.
27. A girl nine years of age, who on her way home from school while engaged in playing a game with other children runs across a street without looking to see whether any team is coming and is struck and run over by a team, cannot recover against the proprietor of the team for her injuries whether the driver is negligent or not, as she cannot be found to be in the exercise of such a degree of care as reasonably is to be expected from a child of her years. *Young v. Small*, 4.
28. The right to place a team between the track of a street railway company and the curbstone of a street and to keep it there for a reasonable time for the purpose of unloading merchandise must be exercised with a due regard to the rights of others lawfully using the street. *McCormack v. Boston Elevated Railway*, 342.
29. If the driver of a tank wagon, drawn by three horses abreast and containing oil, places his team between the track of a street railway company and the sidewalk of a street in order to deliver oil to a varnish factory by a hose pipe across the sidewalk, and if he unfastens the outer trace of the horse nearest the track, and then temporarily leaves his horses and goes back about sixty feet to the office of the varnish factory, he can be found to be negligent and his employer to be liable to a passenger on the running board of an open electric car who is crushed between the car and the hind quarters of the horse as the car is passing the team in the direction in which the horses are facing. *Ibid.*
- See further, *ante*, *On Street Railway*.

*In driving.*

- Due care of one in wagon loaded with boxes driving across track after listening, see *ante*, 22.
- Due care of driver approaching street car track from intersecting street where view is obstructed, see *post*, 20.
- Due care of one driving across street railway track after seeing car about three hundred feet behind him, see *ante*, 14.
- Due care of one struck from behind by car while driving cart on narrow dark road with one wheel between rails of street railway track, see *ante*, 13.

*In maintaining Electric Wires.*

30. In an action against an electric light company for injuries from coming in contact with one of its wires charged with electricity, if it appears that



the wire carried an alternating current of thirty-five hundred volts and that a current of one thousand volts is dangerous to life, that at the place of the accident the wire, though supported on poles, ran through branches of trees likely to come in contact with the wire and rub off the insulation, that the insulation consisted of a rubber cloth covering which it would not take long to rub off, and that there was a better method of insulation for wires going through trees, the question whether the defendant was negligent in not using the better method of insulation is for the jury. *Linton v. Weymouth Light & Power Co.* 276.

31. In an action against an electric light company for injuries from coming in contact with one of its wires charged with electricity, if there is evidence that a wire which might have caused the accident had broken three hundred and twenty-five feet from the place of the accident, and that the defendant's superintendent had been notified by telephone of this break ten minutes before the accident and had promised to send a man to attend to it, and if there also is evidence that at the place of the accident a wire hung down over the gutter next to the sidewalk where the plaintiff was walking, in a loop within five or six feet of the ground, the question of the defendant's negligence should be submitted to the jury. *Ibid.*
32. In an action against an electric light company for injuries from coming in contact with one of its wires charged with electricity, if it appears that the plaintiff at about half past nine o'clock in the evening, after boasting about his knowledge of electricity and poking a broken wire from the gutter to the sidewalk and back again with his umbrella, started to walk along the sidewalk, and that a loop of the same wire was hanging down between two poles about half way to the ground over the gutter adjoining the sidewalk, and if there is evidence that the wind at the time was blowing eleven miles an hour, and the plaintiff contends that the loop of wire was blown against him, while the defendant contends that the wind was not strong enough to blow the loop over the sidewalk and that the plaintiff meddled with the wire while it hung over the gutter, it is for the jury to decide on all the evidence in the case which theory is correct and whether the plaintiff was in the exercise of due care. *Ibid.*

*Injury from Fall of Pole.*

No assumption by lamp trimmer of risk from fall of pole rotten below surface of ground, see *post*, 38.

*In maintaining Freight Elevator.*

33. If a freight elevator at its opening on a street is protected by an automatic gate designed to bar the entrance when the elevator is not there, and a master teamster about to direct the unloading of a truck load of goods sees the gate of the elevator raised indicating that the elevator is in place and, relying on this as he slips in trying to move a box out of the way, steps back where he supposes the elevator to be, it being "somewhat dark in there," and falls down the elevator well to the basement, he can be found to be in the exercise of due care. *Wright v. Perry*, 268.



*Negligence (continued).*

34. It is evidence of negligence on the part of the proprietor of a freight elevator toward a person lawfully on the premises, that originally the entrance to the elevator was closed by a sliding door and that this was removed and replaced by a second hand gate with an automatic arrangement for closing the gate when the elevator went up, which did not work well, sometimes coming down when the elevator went up and sometimes not, that the platform adjoining the entrance to the elevator had a hole in it, and that repeated complaints had been made to the agent of the proprietor in charge of repairs in the building both of the hole in the platform and of the condition of the elevator gate. *Wright v. Perry*, 268.

Defective guides causing elevator to run irregularly, see *post*, 52.

Questions of assumption of risk by and of due care of boy operating elevator which he knows is not in good order, see *post*, 40.

Failure of catch to hold up gate of freight elevator car on one occasion no evidence of defect, see *post*, 51.

*In unloading Vessel.*

Stevedore unloading vessel not liable for injuries to his workman caused by defective hatchway, see *post*, 35, 36.

Hatches of vessel not part of ways, works or machinery of stevedore unloading it, see *post*, 50.

*In lighting Fire with Gasoline.*

Proximate cause of burning of temporary building of plaintiff negligent lighting of fires in stove in building by workmen with defendant's gasoline, and not trespass of defendant in putting in stove or defendant's negligence in storing gasoline in place accessible to workmen, see *ante*, 3.

*In Factory.*

Duty of employer to warn boy of danger from complicated machine, see *post*, 45.

As to injury by employee in shoe factory falling over shaft crossing floor, see *post*, 37.

As to injury from machine previously defective starting of itself after superintendent reported that it had been put in order, see *post*, 55.

*Employer's Liability.*

35. A stevedore unloading a vessel is not liable at common law for injuries to one of his workmen caused by a defect in the covering of a hatchway of the vessel. *Hyde v. Booth*, 290.

36. A stevedore is not liable to the widow and administratrix of a long-shoreman employed by him in unloading a vessel for the death and suffering of the plaintiff's husband and intestate caused by his falling into the hold of the vessel from stepping on a defective section of one of the hatches put in place by the intestate and a fellow workman. *Ibid*.

*Assumption of risk.*

37. A lining maker in a shoe factory, who has been employed in the same room for several months in the previous year, assumes the risk of injuries



from falling over the steel cover of a power shaft crossing the floor of a passageway connecting two alleys between the machines in the room, and there is no duty on the part of her employer to inform her of the obvious existence of the shaft. *Chisholm v. Donovan*, 378.

38. A lamp trimmer employed to clean electric lights who never has worked as a lineman and has had nothing to do with the erection or care of the poles does not assume the risk of an injury from the fall of a pole while he is on it caused by the pole being rotten below the surface of the ground. *Dawson v. Lawrence Gas Light Co.* 481.

39. A brakeman in a freight yard, injured at two o'clock in the morning by having his left arm caught between two cars when in the usual course of his employment attempting to uncouple one of the cars from the other, may be found not to have assumed the risk of such an injury, if there is evidence that the cars came together because one of them was defective, the bumper, draw bar and end sills being gone from it, and that the plaintiff did not know of the defective condition of the car, that when there were broken cars to be handled the conductor told the men, although he did not inform them particularly as to the nature of the damage, and that the conductor did not tell the brakeman that this car was damaged. *Taylor v. Boston & Maine Railroad*, 390.

40. A boy fourteen years of age employed to operate a freight elevator assumes the risk of only obvious dangers, and if there is evidence that the guides of the elevator were defective but that the guides and the manner of their construction were not visible except on an inspection, that the boy had noticed that the elevator did not seem to be in good running order and had so reported to the superintendent, that there always seemed to be something the matter with the elevator, although the boy did not know the cause, and that once it had shaken when he was using it, it is a question of fact for the jury whether the boy assumed the risk of an accident caused by the elevator throwing him to its floor by a violent jerk, and also is a question of fact whether he was in the exercise of due care. *Moylon v. D. S. McDonald Co.* 499.

Operative held not to assume risk of machine starting of itself, see *post*, 55.

Assumption by workman on temporary platform attached to elevated railway structure of risk of its being struck by trolley pole of surface car, see *ante*, 9.

#### Superintendence.

41. If a person in charge of a gang of men employed in raising trusses to support a bridge over a canal leading to the second story of a mill building, who also takes part in the work and runs the engine used in hoisting, after sending a workman upon a truss to clear it from the wall of a brick building against which it is jammed in being raised, negligently starts the engine before the truss is clear of the building, and a rope breaks causing the death of one of the workmen, his act in deciding to start the engine may be found to be an act of superintendence although he also does the manual work of setting it in motion. *McPhee v. New England Structural Co.* 141.



*Negligence (continued).*

42. It is no evidence of negligence on the part of a superintendent that, after having ordered two carpenters working under him to move a staging constructed by the workmen a little way to make room for a window frame, he went away without stopping to see how the staging was moved and did not inspect it afterwards to see whether it had been made as strong as before, and if a journeyman carpenter is injured by a fall of the staging due to the negligence of his two fellow workmen in the manner of moving it or in not strengthening it after it was moved, he cannot hold his employer liable for his injuries. *White v. Unwin*, 490.

43. In an action under the employers' liability act by the administratrix of a brakeman on a freight train of the defendant for the conscious suffering and death of the plaintiff's intestate, it appeared, that when the train arrived at the freight yard at one end of its route it passed under the control of a switching crew employed in the yard and that the conductor of the freight train and the intestate had nothing to do until the switching engine gave a signal by whistles that the work of the switching crew was done, that, while the switching crew still was making up the train and before the signal had been given, the conductor of the train ordered the intestate to go in between two freight cars to couple the air hose, which was a part of the intestate's duty, and assured the intestate that he would "look out for him," and that in obeying this order the intestate was injured by reason of a switching engine backing down upon the train with other cars. There was evidence which warranted a finding that it was a general practice for the conductor to order his men to go in and couple the hose between such cars as had been coupled together although the train had not been fully made up and the switching engine had not ceased its work. *Held*, that the jury might find that the accident was due to the negligence of the conductor in giving the order and failing to notify the intestate of the approach of the switching engine, and might find that the negligent act was within the scope of the duty entrusted to the conductor as a person in charge of a train, as they properly might infer from the evidence that the general practice of ordering the coupling of the air hose before the train was fully made up was known to the managing officials of the defendant and was approved by them. *Edgar v. New York, New Haven, & Hartford Railroad*, 420.

## Duty to inspect.

44. When blasting rock with dynamite to see that no unexploded charge remains in any holes. *Hoe v. Boston & Northern Street Railway*, 187 Mass. 67, affirmed. *Byrne v. Farnum*, 219.

## Duty to instruct.

45. In an action by a boy, less than thirteen years of age when injured, against his employer for injuries from a complicated and dangerous machine, the evidence described in the opinion was held to be sufficient to submit to the jury under instructions which would authorize them to return a verdict for the plaintiff if they found that the defendant failed to give the plaintiff such instructions as were reasonably necessary to



enable a boy of his age and intelligence to see and appreciate the nature of the machine and the danger attending his work upon it. *Rudberg v. Bowden Felting Co.* 865.

**Duty to warn.**

46. If an experienced working foreman is sent with two men under him by a general superintendent to clean up a room which for some months has been unused, his employer owes him no duty to warn him of a defect in the floor of the room from the boards being warped or sprung. *O'Keeffe v. John P. Squire Co.* 210.
  47. In an action by a girl employed in a factory against her employer for personal injuries, evidence that the plaintiff was of less than average intelligence is immaterial upon the issue of the defendant's negligence unless there also is evidence that the defendant through its agents knew or ought to have known that she was of less than average intelligence. *Daniels v. New England Cotton Yarn Co.* 260.
  48. If the proprietor of a factory posts notices in places where they can be read by the operatives warning them against wearing loose garments and flowing hair which may be caught in the machinery, he has performed his whole duty in this regard without calling the attention of the operatives to the notices or seeing that they read them thoroughly. *Ibid.*
  49. It is not the duty of the proprietor of a factory to warn a girl fourteen years and five months of age against the danger of wearing her hair hanging in a braid down her back so that it may be caught and wound up on a roller, if the girl herself knows that the rollers wind up thread, and means not to get any part of herself, her dress, sleeves, hair or anything else wound up in the rollers. *Ibid.*
- No duty of employer to warn employee of obvious existence of shaft crossing floor in factory, see *ante*, 87.

**Ways, works or machinery.**

50. The hatches of a vessel are not part of the ways, works or machinery of a stevedore engaged in unloading it. *Hyde v. Booth*, 290.
51. It is no evidence of a defect in the ways, works or machinery of an employer that the gate of a freight elevator car pushed up by another employee of the defendant fell on the head of the plaintiff, as he stepped out of the car, because the catch at the top of the car although it gave the usual click failed to hold the gate when pushed up, if it appears that until the time of the accident the catch had worked well and its failure to work properly on that occasion was not explained. *Hill v. Iver Johnson Sporting Goods Co.* 75.

**Defective appliances.**

52. In an action by a boy employed to operate a freight elevator, against his employer, for injuries from being thrown to the floor of the elevator by its giving a violent jerk, in consequence of which his foot slipped over the edge of the car and was caught, if there is evidence that the car ran irregularly because of the defective condition of the guides, and that if a proper investigation had been made the imperfection would have been



*Negligence (continued).*

discovered, it may be found that the defendant failed to provide suitable instrumentalities for the plaintiff's employment or to keep them in reasonably safe repair. *Maylon v. D. S. McDonald Co.* 499.

53. A switchman on a reversible motor car, attached to a flat car loaded with machinery and moulds being transported within the yard of the works of an electrical company, who was thrown under the car and injured owing to the breaking of a board step supported by brackets attached to the side of the car on which he was standing, he having jumped upon it after throwing open a switch and running back in performing his work in the usual way, can be found to have been in the exercise of due care; and, if the broken board forming the step was examined immediately after the accident and was found to have an old split where it broke and to have become worn through and chipped from use, it can be found that the step was a defective appliance, and that the employer and proprietor by using due diligence would have known of its condition. *Smith v. Thomson-Houston Electric Co.* 371.
54. In an action against a machine company for causing the suffering and death of the plaintiff's intestate and husband, who was the foreman of the defendant's foundry and an experienced moulder but not a machinist, by the contents of a ladle of molten iron being spilled upon him from the simultaneous breaking of two bolts securing an iron yoke which held the top of a crane to which the ladle was attached against a timber extending across the foundry, if it appears that the bolts had been in use for fifteen years during which they at times had been loose and subjected more or less to shock, and that both of them were crystallized, it is a question of fact for the jury whether the failure to subject the bolts to some kind of examination or to replace them by new ones was negligence on the part of the defendant. *Harris v. Putnam Machine Co.* 85.
55. In an action by a girl employed in a bindery, against her employer, for having the fingers of her left hand cut off by the dull blade of a folding machine coming down upon them after she had stopped the machine and was straightening out a leaf of paper below the blade, it appeared, that the machine previously had been out of order and that the plaintiff had notified the superintendent, who had examined it and said that it was all right, that a few days before the accident the machine had started from a dead stop, and that the plaintiff had called the machinist's attention to it and he had "fixed it." On cross-examination the plaintiff testified that she could have straightened out the top leaf of paper without putting her hand under the blade. *Held*, that the evidence warranted the jury in finding that the machine was defective, that it had not been repaired properly and that the accident was caused by such want of proper repair. *Held, also*, that the jury could find that the plaintiff was in the exercise of due care in putting her hand under the blade to straighten out the leaf after she had stopped the machine, as after the machine had been repaired by the machinist she had no reason to apprehend that it would start of itself; *also*, that she did not assume the risk of the machine starting of itself. *O'Neil v. Ginn*, 846.
56. If roofers using an extension ladder, supplied by their employer, which



has a defective fastening at the junction of the two parts when extended, the two parts having become separated by reason of this defect, fasten them together in their own way with a rope found on the premises which is old and unfit for use, no superintendent being present at the time, and if another roofer who has not taken part in the fastening goes up this ladder and when called by a fellow workman to come down proceeds to do so and is thrown to the ground by the ladder giving way from the breaking of the unsound rope, the injured workman cannot recover from his employer for his injuries thus caused, the direct cause of the accident being not the original defect in the ladder but the negligence of his fellow workmen in failing to fasten the two parts of the ladder together securely by a sound rope. *Higgins v. Higgins*, 118.

**Scope of employment.**

Not within scope of authority of conductor of street car to call policeman to make arrest in old discarded car as practical joke, see **MASTER AND SERVANT**.

Conductor of freight train held authorized to order brakeman to couple hose between two cars although train still in charge of switching crew, see *ante*, 43.

**Fellow servant.**

No recovery by workman injured through negligence of fellow workmen in fastening ladder with defective rope, see *ante*, 56.

**Action by widow.**

57. Under R. L. c. 106, the widow of an employee, not suing as administratrix, cannot maintain an action against the employer of her husband for negligently causing his death unless the death was instantaneous and without conscious suffering. *Smith v. Thomson-Houston Electric Co.* 371.

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Liability of superintendent of streets for personal negligence in superintending blasting, see **MUNICIPAL CORPORATIONS**, 5.

Municipal officer liable for personal misfeasance in performance of public duties, see **MUNICIPAL CORPORATIONS**, 4.

Liability of officers and agencies of government for negligence in performance of public duties, see **MUNICIPAL CORPORATIONS**, 2.

Right of workman for sub-contractor to recover from elevated railway company for injuries caused by its negligence is not affected by latter's contract with principal contractor as to accidents to workmen, see **CONTRACT**, 12.

Duty of master of ship to decide treatment of injured seaman, and certain treatment held reasonable, see **SEAMAN**.

**NEGOTIABLE INSTRUMENTS ACT.**

Enforcement, under R. L. c. 73, § 141, of altered instrument by innocent holder according to its original tenor, see **BILLS AND NOTES**, 2.



## NORTHERN AVENUE.

- St. 1903, c. 381, as to construction of Northern Avenue in Boston not unconstitutional as imposing expenditure for private use, see CONSTITUTIONAL LAW, 5.
- St. 1903, c. 381, does not impair obligation of contract as to extension of Eastern Avenue, see CONSTITUTIONAL LAW, 11.
- St. 1903, c. 381, unconstitutional in part only, see CONSTITUTIONAL LAW, 1.

## NUISANCE.

1. To determine whether a nuisance exists which will be enjoined in equity the effect of the things complained of upon persons of ordinary health and sensitiveness is to be considered rather than their effect upon those afflicted with disease or an abnormal condition of the nerves. *Wade v. Miller*, 6.
  2. Keeping a number of hens and two crowing cocks in hen houses and a hen yard maintained in a cleanly condition in the principal village of a country town near or adjoining the dwelling house of another can be found not to be a nuisance entitling the owner of the dwelling house to an injunction to restrain it. *Ibid.*
- Negligent construction of new street over existing highway not closed to travel may be creation of nuisance on part of contractor, see WAY, 4.
- In action at common law for digging and leaving pit in highway defendant is not entitled to notice of injury under R. L. c. 51, § 20, see WAY, 9.

## OFFICER.

- If a police officer, having a search warrant for intoxicating liquors in a certain house, goes there in the absence of the owner and takes away a safe, and if afterwards, on the refusal of the owner to open the safe, the officer causes it to be opened by an expert who breaks the lock, using no more force than is necessary, and if the officer finding in the safe none of the liquor described in the warrant returns it to the owner, the officer is liable to the owner in an action of tort for removing the safe and breaking it open without the owner's consent. *Blackmar v. Nickerson*, 399.
- Liability of officer taking goods in replevin where bond not approved according to statute, see REPLEVIN.
- Reasonable search for goods before arrest for non-payment of tax, see TAX, 8.
- Return of constable on tax warrant of diligent search for goods of delinquent *prima facie* evidence, see TAX, 9.
- Questions of alleged improper delay in taking to jail one arrested on tax warrant and of alleged improper treatment in placing him in cell of police station are for jury, see TAX, 10.
- Delivery of personal property of mortgagor by attaching officer to assignee in insolvency of mortgagor is not conversion as against mortgagee who has not begun foreclosure or made proper demand, see ATTACHMENT, 5.



## PARTNERSHIP.

Participation in the profits of a firm is evidence that the person so participating is a partner, and that the persons managing the business of the firm are his agents. *Berry v. Pelneault*, 418.

## PLEADING, CRIMINAL.

*Variance.*

Failure, in indictment for uttering forged check, to allege indorsement of alleged payee not variance, see *FORGERY*, 2.

## PLEDGE.

*Redemption.*

A pledge of four successive mortgages upon the same land was made to secure the payment of a certain note, by an instrument in writing giving the pledgee the right to sell the collateral security and to foreclose the mortgages or any of them at public or private sale, the pledgee having the right to purchase at the sale. The note was not paid at maturity, and the pledgee assigned the note and the four mortgages to his agent or attorney, who by instruction of the pledgee proceeded to foreclose one of the mortgages under a power of sale contained in it. At the sale the pledgee bid in the property and had it conveyed to a person for his benefit. No money was paid by any one and no payment was indorsed on the note or credited to the pledgor. The pledgor then filed a bill to redeem. *Held*, that he was entitled to redeem the three unexpired mortgages and the proceeds of the mortgage that had been foreclosed; that the foreclosure sale was good and the pledgee had a right to purchase under it, but that the net proceeds of the sale were to be applied toward the payment of the note of the pledgor, and the pledgee was ordered on payment of the balance of the note to assign the other three mortgages to the pledgor. *Jennings v. Wyzanski*, 285.

## POOR DEBTOR.

1. Whether an agreement in writing signed by a poor debtor is a waiver of the provision of Pub. Sts. c. 171, § 15, that no execution shall be issued within twenty-four hours after the entry of judgment is a question of law for the court. *Washington National Bank v. Williams*, 103.
2. The recognizance of a poor debtor is not void because he was arrested within twenty-four hours after the entry of the judgment against him if he signed an agreement in writing that judgment might be entered for the plaintiff and "execution issued forthwith." *Ibid*.

## PRACTICE, CIVIL.

*Service.*

1. Under R. L. c. 167, § 34, the service of a writ at the last and usual place of abode of the defendant is not good in case the defendant is temporarily



Practice, Civil (*continued*). -

absent from the Commonwealth without the further notice required for absent defendants by R. L. c. 170. *Porter v. Prince*, 80.

2. If, in an action against a town for injuries alleged to have been caused by a defect in a highway, it appears that the notice in writing required by the statute of the time, place and cause of the injury was left by an agent of the plaintiff between eight and ten o'clock in the evening of the last day allowed for service at the house of one of the selectmen of the defendant occupied by him as his home and there delivered to a household servant at the door, and the defendant does not call the servant as a witness or show any reason for not calling her, this will justify a finding that the notice was delivered to the selectman on that evening. *McCarthy v. Dedham*, 204.
3. In proving the notice to a town under R. L. c. 51, §§ 20, 21, of the time, place and cause of an injury from a defect in a highway, if it is shown that on the evening of the last day allowed for service such a notice was delivered to a household servant of one of the selectmen at his dwelling, that it was placed somewhere in his personal presence under his control and that he knew it was there, it does not matter that he did not read it or even take it into his hands until three days later. *Ibid*.

Service on one Bethiah as Bertha valid where she was known by both names, see MARRIAGE AND DIVORCE, 2.

#### *Abatement.*

4. Filing an answer to the merits waives the right to set up matter in abatement. *Chamberlayne v. Nazro*, 454.
5. Failing to object to the reference of a case to an auditor and appearing at the hearing before the auditor on the merits waives any right to set up matter in abatement. *Ibid*.

#### *Agreed Statement of Facts.*

6. Where, on a question in regard to the allowance of interest, it appears that the case was heard in the Superior Court upon an agreed statement of facts, with a stipulation that inferences might be drawn from certain testimony bearing upon an alleged agreement in regard to interest, and the Superior Court has given judgment for an amount which includes interest, it will be assumed that the finding upon the testimony as to the agreement was in favor of the plaintiff, and if there is evidence to warrant the finding it will not be disturbed. *Davis v. National Ins. Co.* 299.

#### *Amendment.*

7. Where a plaintiff is allowed to amend a suit in equity into an action at law on payment of costs to the defendant by a certain day and the defendant accepts a payment of the costs after the day named and retains the money, and subsequently files a general appearance and answer to the declaration at law, this is a waiver by the defendant of any right to object to the plaintiff's amendment on the ground that the plaintiff did not pay the costs within the time named in the order allowing the amendment. *Crossman v. Griggs*, 156.



*Interrogatories.*

Orders allowing further answers or further time in which to answer interrogatories are within discretion of court, see INTERROGATORIES, 1.

Reason for declining to answer interrogatories must be stated under oath, see INTERROGATORIES, 2.

Plaintiff cannot by interrogatories compel defendant to disclose report of case made to it by its agents, see INTERROGATORIES, 3.

*Auditor's Report.*

8. Unless the rule to an auditor provides that his findings on matters of fact are to be final, a motion to recommit an auditor's report is addressed to the discretion of the presiding judge, and his ruling is not subject to exception. *Allwright v. Skillings*, 538.

9. When in an action of contract the only evidence on a certain claim of the plaintiff is an auditor's report finding generally for the plaintiff and the testimony of the defendant denying the agreement or understanding on which the claim is based, a judge sitting without a jury may sustain the plaintiff's claim, as the finding of the auditor upon the general question of liability may furnish evidence of facts which are involved in or may be inferred from the general finding, and may cause the judge to disbelieve the testimony of the defendant. *Carroll v. Carroll*, 558.

*Verdict.*

10. Where in an action to recover property obtained by fraud there is a count for conversion and one for money had and received and the jury return a general verdict for the plaintiff, if it has appeared that the property was converted by the defendant to his own use but was not turned into money the verdict cannot be sustained, as it may have been returned on the count for money had and received which will not lie for such a conversion. *Hagar v. Norton*, 47.

11. In an action by the administratrix of an employee against his employer for injuries suffered by the intestate resulting in his death, with counts under the employers' liability act, and also a count at common law, if at the same time the same plaintiff, as widow of the intestate, has brought another action against the same defendant for causing the death of her husband, which she is not entitled to maintain, and if the judge instructs the jury, that in case the plaintiff prevails under the statute the entire damages recovered in both actions cannot exceed \$5,000, and the jury return a general verdict for the plaintiff in the second action for \$2,500, having returned a verdict for her in the first action for \$4,500, the verdict in the second action will not be allowed to stand, as it may have been returned on the statutory counts. *Smith v. Thomson-Houston Electric Co.* 371.

12. If, in an action of tort for personal injuries from alleged negligence of the defendant, the presiding judge orders a verdict for the defendant and states that he does so solely on the ground of the plaintiff's want of due care, this court on exception by the plaintiff may sustain the verdict against



Practice, Civil (*continued*).

him on the ground that there was no evidence of the defendant's negligence whether the plaintiff was in the exercise of due care or not. *O'Keeffe v. John P. Squire Co.* 210.

*Appeal.*

13. Under R. L. c. 173, § 96, a plaintiff is not required to take an appeal within thirty days after the entry of an interlocutory judgment sustaining a demurrer to his declaration, but may wait until final judgment is ordered for the defendant before taking his appeal. *Cummings v. Ayer*, 292.

*New Trial.*

14. On a motion for a new trial a finding of the presiding judge that two of the jurors, alleged to have been asleep, were awake during the whole trial and that no material portion of the evidence escaped their attention, is final. *White Sewing Machine Co. v. Phenix Nerve Beverage Co.* 407.
15. In an action by an administrator under the employers' liability act against the employer of his intestate for personal injuries of the intestate resulting in death, where the declaration contains no count for the death, if exceptions are sustained to an erroneous instruction relating to damages which does not affect the issue of liability, the new trial will not be confined to the question of damages if it appears probable that the plaintiff will wish to amend his declaration by adding a count for the death of his intestate under R. L. c. 106, §§ 72, 74. *Smith v. Thomson-Houston Electric Co.* 371.
16. Where exceptions of the defendant in an action of contract, otherwise overruled, are sustained on the ground that interest has been allowed from the date of the writ when it should have been allowed only to a previous date when the defendant was summoned as trustee of the plaintiff in another action still pending, the court may make an order that the exceptions shall be overruled if the plaintiff remits the amount of excessive interest, or otherwise shall be sustained. *Walker v. Lancashire Ins. Co.* 560.
17. If in an action for personal injuries the presiding judge in his charge to the jury has made certain remarks not pertinent to the case, which if unrecalled might be prejudicial to the defendant, but afterwards in an emphatic way tells the jury to dismiss this part of the charge from their minds and to deal with the case as if the remarks had not been made, it is to be presumed that the jury obeyed the instructions of the judge, and it may be held that justice does not require that a verdict for the plaintiff should be set aside. The same principle may be applied to the admission of incompetent evidence which the jury is told to disregard. *Rudberg v. Bowden Felling Co.* 365.

*Exceptions.*

18. Exceptions not argued are considered waived. *Swain v. Boston Elevated Railway*, 405.
19. No exception lies to a refusal to give an instruction in the language requested if it was given in substance. *Ibid.*
20. An exception will not be sustained to an instruction which even if erroneous did the excepting party no harm. *Cummings v. Holt*, 69.



21. Where in a case tried before a judge sitting without a jury the evidence is conflicting the finding of the judge on a matter of fact is not open to revision by this court. *Curran v. Paul Whittin Manuf. Co.* 264.
22. An exception to a ruling, that the plaintiff is not entitled to recover, must be overruled if the ruling can be sustained on any ground, and the defendant's rights are not narrowed by any reason which the presiding judge may have given for his ruling. *O'Keeffe v. John P. Squire Co.* 210.
23. In an action against a town for injuries alleged to have been caused by a defect in a highway, on an exception to a refusal of the judge to rule that there was no sufficient evidence to authorize a finding that a proper statutory notice was given to the town within the time required, the defendant cannot in argument before this court raise the point that the notice was ambiguous, if the record plainly shows that the ruling requested and refused was intended to mean, not that the notice was deficient in form, but that it was not given in time, and that the judge so interpreted the request. *McCarthy v. Dedham*, 204.
24. If, at the trial of an action against a town for injuries alleged to have been caused by a defect in a highway, the defendant did not contend that it was misled by the plaintiff's notice of the time, place and cause of the injury or that the plaintiff had an intention to mislead, the defendant cannot raise that point in argument before this court on an exception to a refusal of the judge to rule generally that the plaintiff is not entitled to recover, especially where the evidence would warrant a conclusion that there was no intention to mislead and that the defendant was not misled. *Ibid.*
25. Where by a bill of exceptions it appears that at the close of the plaintiff's evidence the judge refused to rule that the plaintiff could not recover except for certain items admitted to be due, that thereupon the trial proceeded and the defendant put in his evidence, and that upon the whole evidence the judge found for the plaintiff for the entire sum claimed, an exception by the defendant to the judge's ruling cannot be sustained, whether the ruling was correct or not, for the plaintiff's case if originally insufficient may have been completed by the evidence put in by the defendant so as to justify the finding on all the evidence. *Todd v. MacLeod*, 144.

No error committed in exclusion of certain evidence where questions in themselves had no bearing on issue and it did not appear what answers would be, see MALICIOUS PROSECUTION.

#### *Costs.*

26. Under R. L. c. 203, § 9, which provides that when two or more cases are tried together the presiding judge may reduce the witness fees and other costs, but that "not less than the ordinary witness fees and other costs recoverable in one of the cases which are so tried together shall be allowed," the judge in his discretion may reduce the costs in such a way as to leave no costs in some of the cases, if he leaves the aggregate amount not less than the costs recoverable in any one of the cases. *Green v. Sklar*, 368.



Practice, Civil (*continued*).

R. L. c. 203, § 9, providing for reduction of costs when cases tried together is constitutional, see CONSTITUTIONAL LAW, 18.

Validity of agreement by attorneys extending time for payment of costs ordered as condition of amendment, see ATTORNEY.

Where party is allowed to amend on payment of costs on certain day, acceptance of costs by adversary on later day is waiver of right to object to allowance of amendment, see *ante*, 7.

## PRACTICE, CRIMINAL.

### *Venue.*

1. On an indictment for larceny by false pretences under R. L. c. 203, § 26, the defendant under R. L. c. 218, § 47, can be prosecuted only in a county in which he has had possession of the property alleged to have been stolen. *Commonwealth v. Friedman*, 808.

### *Conduct of Trial.*

2. In a trial for murder, where the defence is insanity, the order in which evidence of insanity shall be introduced is within the discretion of the court. *Commonwealth v. Johnson*, 382.

### *Exceptions.*

3. Where in a criminal case the instructions requested by the defendant have been given in substance so far as applicable, no exception lies to the refusal of the judge to give them in the language of the requests. *Commonwealth v. Johnson*, 382.
4. On the trial of an indictment for uttering a forged check knowing it to be forged, if the bill of exceptions does not show any evidence or offer of proof that the check was dated on the Lord's day, the defendant, on the argument of an exception to a refusal of the trial judge to rule that he should be acquitted, cannot by resorting for the first time to the calendar show that the check bore date on the Lord's day and therefore was void. *Commonwealth v. Bond*, 91.

### *Sentence.*

Criminal contempt of court cannot be punished by imprisonment in house of correction, see CONTEMPT, 1.

Under R. L. c. 215, § 6, cl. 4, sentence for attempt to commit larceny from person may be two and one half years in house of correction, see LARCENY.

### *Contempt.*

Presentation by officer as verification of facts constituting criminal contempt, see CONTEMPT, 3.

Criminal contempt of court cannot be punished by imprisonment in house of correction, see CONTEMPT, 4.

### *Writ of Error.*

Writ of error lies to reverse judgment of Superior Court punishing criminal contempt, see CONTEMPT, 1, 2.



## PROBATE COURT.

*Appeal.*

Probate appeals are in equity and governed by equity practice so far as applicable, see EQUITY PLEADING AND PRACTICE, 7.

Verdict of jury in probate appeal on issues of fact submitted is conclusive if not set aside, see EQUITY PLEADING AND PRACTICE, 8.

*Effect of Decree.*

Decree disallowing trustee's account and ordering restitution of certain losses alters account presented and one who has assented to account is not estopped to claim under decree, see TRUST, 8.

## PROXIMATE CAUSE.

Where workman is injured by fall on ladder with defective fastening tied by fellow workmen with defective rope, defect in rope and not in fastening is proximate cause of injury, see NEGLIGENCE, 56.

Proximate cause of burning of temporary building of plaintiff by workmen of defendant negligence in starting fire in stove with gasoline and not trespass of defendant in putting stove in plaintiff's building or its negligence in storing gasoline in place accessible to workmen, see NEGLIGENCE, 8.

## RAILROAD.

1. It is not the duty of a railroad company to construct and maintain its gates at an ordinary crossing on the main street of a town of sufficient strength to withstand a runaway horse dashing against or rearing over them. *Brooks v. Boston & Maine Railroad*, 416.
2. R. L. c. 111, § 208, forbidding a railroad corporation to haul a car not equipped with automatic couplers "in moving traffic" between points in this Commonwealth, and § 209 of the same chapter, providing that an employee of a railroad corporation injured by any car used contrary to this provision shall not be considered to have assumed the risk of such injury, although he continues in the employment of such corporation after the unlawful use of such car has been brought to his knowledge, do not apply to a car being moved to a repair shop to be repaired. *Taylor v. Boston & Maine Railroad*, 390.

*Liability under Pub. Sts. c. 112, § 213.*

3. In an action against a railroad company under Pub. Sts. c. 112, § 213, for injuries at a railroad crossing to which neglect of the defendant to give the signals required by law contributed, the burden of showing gross negligence on the part of the plaintiff is upon the defendant, and it does not establish this defence that the plaintiff has not shown affirmatively that he was in the exercise of due care, or that the defendant has introduced evidence on which the jury would be warranted in finding that the



Railroad (*continued*).

plaintiff was guilty of gross negligence, unless they have found so. *Kenny v. Boston & Maine Railroad*, 127.

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Conductor of freight train held authorized to order brakemen to couple hose between two cars, although train still in charge of switching crew, see NEGLIGENCE, 43.

Certain contract of city with railroad company to maintain gateman at crossing in consideration of withdrawal by railroad of opposition to laying out of highway there is valid where made in contemplation of order of county commissioners subsequently passed, see MUNICIPAL CORPORATIONS, 1.

As to negligence on railroad, in freight yard and at railroad crossing, see NEGLIGENCE, 4, 5, 39, 43, 53.

### RELEASE.

An absolute and unequivocal release must be construed in accordance with its terms although these embrace matters not in the minds of the parties at the time of its execution. *Klopot v. Metropolitan Stock Exchange*, 335.

For effect of release signed in fictitious name on claims under R. L. c. 99, for money paid on wagering contracts by signer of release in his own name, see WAGERING CONTRACTS, 8.

### REPLEVIN.

If an officer takes goods on a writ of replevin from one having a valid lien thereon, and delivers them to the plaintiff in replevin upon his giving a bond, the sureties on which have been approved by a master in chancery but without notice to the defendant in replevin as required by R. L. c. 190, § 16, and if the plaintiff in replevin commits a breach of the condition of the bond by failing to prosecute his action, and the sureties on his bond prove to be worthless, the defendant in replevin may maintain an action of tort in the nature either of trespass or trover against the officer for the damages sustained by him, as the officer, although his original taking of the goods is lawful, by delivering them to the plaintiff in replevin without complying with the provisions of the statute becomes a wrongdoer from the beginning. *Parker v. Young*, 600.

### RES JUDICATA.

A final decree dismissing a bill in equity, from which no appeal was taken, is a bar to another bill between the same parties for the same cause of action, and the plaintiff cannot avoid the defence of *res judicata* by seeking to maintain the suit on grounds different from those mentioned in the former bill. *Barnes v. Huntley*, 274.

### RULES OF COURT.

Under Chancery Rule 25 of the Supreme Judicial Court fact occurring after filing of bill in equity making good plaintiff's case may be set up by amendment, see EQUITY PLEADING AND PRACTICE, 5.



**SALE.***Conditional.*

Buyer liable for loss by fire under contract of conditional sale may recover under standard fire insurance policy both for instalments paid and liability incurred, see **INSURANCE**, 1.

Action by unpaid vendor of goods under contract of conditional sale against mortgagee for conversion by their retention before and after foreclosure sale, see **CONVERSION**.

*Rescission.*

Sale to corporation induced by false statement of assets and liabilities filed by its officers may be rescinded by vendor, see **CORPORATION**, 11.

For rights of corporation after rescinding sale of property to it by its promoters at a large profit without disclosing material facts, see **CORPORATION**, 5-8.

*Unfair Competition.*

R. L. c. 56, § 1, does not prohibit sale with agreement to give reasonable discount if purchaser does not deal in goods of any other manufacturer, see **UNFAIR COMPETITION**.

**SCHOOLS AND SCHOOL COMMITTEE.**

Mandamus not proper remedy to determine whether duty of caring for schoolhouses belongs to school committee or to mayor and city council, see **MANDAMUS**, 1.

**SEAMAN.**

In an action by a seaman against the master of a vessel on which he was employed, for alleged aggravation of an injury from having the fingers of his right hand frozen while pounding ice from the rigging, by the defendant's failure to provide proper medical and surgical treatment and keeping him at work after his injury, it appeared, that the vessel was a three masted schooner carrying a cargo of coal from Baltimore to New Bedford in the month of February, and was short handed, having on board only the master, the mate, who had been injured, four seamen and a steward, that she experienced very cold weather, a blizzard and heavy gales, and was in danger during the three days from the time of the plaintiff's injury until the plaintiff turned into his bunk and ceased to work, that the plaintiff's hand, as soon as he returned to the deck after having it frozen, received the proper treatment by being immersed in ice or in cold water until warmth and feeling came back, and thereafter was treated by the application of grated potatoes as a poultice, which was shown to be an ordinary remedy. *Held*, that it was the duty of the defendant to decide what under the circumstances to do with and for the plaintiff in connection with all the duties resting upon him as master of the vessel, and that there was no evidence which would justify a finding that the defendant's decisions as to what he should do in managing the vessel and in his treat-



ment of the plaintiff were not reasonable and proper at the times and under the circumstances when they were made. *Also*, that it was not material that the defendant did not give the plaintiff oil for his hand when he asked for it, as it was shown that the defendant furnished the ordinary remedies. *Johnson v. Holmes*, 170.

### SEARCH WARRANT.

Liability of officer removing and opening safe under search warrant where safe does not contain property described in warrant, see *OFFICER*.

### SEWER.

Assessment made under Pub. Sts. c. 50, § 7, not quashed because laid by selectmen instead of by town, see *TAX*, 1.

### SHIP.

Duty of master to decide treatment of injured seaman, and certain treatment held reasonable, see *SEAMAN*.

Hatches of vessel not part of ways, works or machinery of stevedore unloading it, see *NEGLIGENCE*, 50.

Stevedore unloading vessel not liable for injuries to workman caused by defective hatchway, see *NEGLIGENCE*, 85, 86.

### SPOILIATION OF INSTRUMENTS.

Citation by *KNOWLTON*, C. J. of cases relating to the spoliation of instruments. *Sullivan v. Sullivan*, 380.

Presumption against spoliator of instrument that it was valid when destroyed, see *BILLS AND NOTES*, 8.

Enforcement under R. L. c. 78, § 141, of altered instrument by innocent holder according to its original tenor, see *BILLS AND NOTES*, 2.

### STATE HOUSE GROUNDS.

Hancock Avenue a part of, and not a street, see *WAY*, 1.

### STATUTE.

#### *Construction.*

In the construction of a special charter granted by the legislature of another State, an interpretation made by the highest court of that State is entitled to great consideration if not absolutely conclusive on this court. *Larkin v. Knights of Columbus*, 22.

St. 1809, c. 95, § 2, contains no grant by Commonwealth to Lechmere Point Corporation of right to fill flats, see *TIDE WATER*.



Pub. Sts. c. 50, § 7, (R. L. c. 49, § 5,) providing for sewer assessments construed not to authorize assessment in excess of special benefit and so is constitutional, see CONSTITUTIONAL LAW, 2.

St. 1903, c. 437, imposing excise tax on foreign corporations does not apply to corporations engaged solely in interstate commerce but does apply to those engaged partly in domestic commerce and is constitutional, see CONSTITUTIONAL LAW, 12.

## STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

## STATUTES CITED AND EXPOUNDED.

See page 693.

## STREET RAILWAY.

### *Passenger.*

1. One who has alighted from an electric street car, upon a reserved space of grass in the centre of a street over which the tracks of the street railway are laid, has ceased to be a passenger of the railway company operating the car, and while crossing the reserved space after alighting has only the rights of a person lawfully upon the street. *Conroy v. Boston Elevated Railway*, 411.

### *Discarded Car.*

Street railway company not responsible for condition of old discarded car used by its conductors as a place of shelter, see NEGLIGENCE, 10.

### *Power to light Streets.*

2. There is nothing in R. L. c. 121, §§ 24, 26, c. 122, § 1, or any other statute of the Commonwealth making it unlawful for a street railway company as an incident to its business to use electricity from its power station in lighting the streets through which its cars run. *Selectmen of Wellesley v. Boston & Worcester Street Railway*, 250.

### *Condition imposed by Grant of Location.*

3. Under R. L. c. 112, § 7, the board of aldermen of a city or the selectmen of a town in granting a location to a street railway company lawfully may impose a condition that the company shall furnish a system of electric lighting from its own power station for the entire length of the location, giving light of a specified power. *Selectmen of Wellesley v. Boston & Worcester Street Railway*, 250.
4. Under R. L. c. 112, § 7, the board of aldermen of a city or the selectmen of a town in granting a location to a street railway company cannot impose a condition regulating fares. Following *Keefe v. Lexington & Boston Street Railway*, 185 Mass. 183. *Ibid.*



*Street Railway (continued).*

5. Under Pub. Sta. c. 113, § 7, the selectmen of a town in granting an original location to a street railway company could impose a more onerous duty as to repairs of the public ways than that imposed by the general laws. *Hyde Park v. Old Colony Street Railway*, 180.
6. A condition imposed by the selectmen of a town in granting an original location to a street railway company under Pub. Sta. c. 113, § 7, that the company shall keep that portion of the streets and highways included between its tracks and for a distance of eighteen inches outside thereof at all times flush with the top of the track and shall keep the same in repair to the satisfaction of the selectmen, is valid. *Ibid.*
7. Under Pub. Sta. c. 113, § 7, as well as under St. 1898, c. 578, § 13, which expressly provides for imposing methods of construction, the selectmen of a town in granting an original location to a street railway company could impose a condition, that the railway company should reconstruct its track and roadbed with such different material as the board of selectmen might require. *Ibid.*
8. The last clause of § 13 of St. 1898, c. 578, in regard to the granting of locations to street railway companies, providing that "all locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of this section," is in effect a declaration that the interpretation given in practice to Pub. Sta. c. 113, § 7, was correct. *Ibid.*
9. A condition contained in the original grant of location to a street railway company by the selectmen of a town was as follows: "Said railway company shall reconstruct their track and roadbed by laying down such different material therefor as the board of selectmen after public hearing may judge that public safety and convenience requires; but no radical change in material of said track or roadbed shall be made until after the road has been in operation one year, except to make necessary repairs." *Held*, that under this condition the selectmen could make a valid order requiring the railway company to take up fifty pound T rails specified in the location and replace them by ninety pound girder rails. *Ibid.*

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Not within scope of employment of conductor to call policeman as practical joke to make arrest in old discarded car, see *MASTER AND SERVANT*.

In action against street railway company plaintiff cannot by interrogatories compel defendant to disclose report of accident made to it by motorman and conductor, see *INTERROGATORIES*, 8.

As to negligence on street railway, see *NEGLIGENCE*, 10-25.

As to negligence on elevated railway, see *NEGLIGENCE*, 6-9.

### SUPERINTENDENT OF LAMPS.

Servant of city in repairing lamp posts, see *MUNICIPAL CORPORATIONS*, 6.

### SUPERINTENDENT OF STREETS.

Liable for personal negligence in superintending blasting, see *MUNICIPAL CORPORATIONS*, 5.



## SUPERIOR COURT.

Superior court has full authority over accounts of trustees, see TRUST, 2.

Writ of error lies to reverse judgment of Superior Court imposing punishment for criminal contempt of court, see CONTEMPT, 1, 2.

## SURETY.

A surety upon a promissory note, which is secured by the note of another person pledged as such security by his co-surety, is not discharged from liability because without his knowledge or consent the maker of the note held as collateral by an arrangement made through the co-surety was allowed to renew it after maturity by giving in exchange another note payable six months later which at maturity was paid only in part, unless he shows that the acceptance of the new note for the note surrendered resulted in some wrong to him, and if it does not appear that had the surrendered note been retained more money could have been collected on it than was collected on the new note. *North Avenue Savings Bank v. Hayes*, 185.

Judgment establishing lien is conclusive on principal and surety in action on bond to dissolve lien in absence of fraud or collusion, see JUDGMENT, 1.

## SURVIVAL OF ACTIONS.

A right of action for the conversion of personal property obtained by fraud and for money had and received for the portion of it turned into money survives to the administrator of the person defrauded. *Hagar v. Norton*, 47.

Right of corporation to recover of officer property wrongfully converted by him, survives against his estate, see CORPORATION, 8.

## TAX.

*Assessments for Benefits.*

1. If, when a town has adopted a system of sewerage under Pub. Sts. c. 50, § 7, providing for assessments for benefits under § 4 of that chapter, the assessments should be made by the selectmen instead of by the town itself, which here was not decided, this court will not grant a writ of certiorari to quash an assessment because made by the town, especially where the petition is filed more than nine years after the assessment was made. *Cheney v. Beverly*, 81.
2. On a petition for damages for the taking of an easement in a strip of land by the city of Boston under St. 1897, c. 426, as amended by St. 1899, c. 450, for locating anew the channel of a watercourse for sewerage purposes, if the city has neglected to lay a betterment assessment as it might have done under the last named statute, it cannot set off the special benefit to the petitioner against the petitioner's claim. *Atkins v. Boston*, 77.
3. An owner of real estate on which betterments have been assessed for the extension and widening of a highway cannot complain because the street



- commissioners in making the assessment left out of consideration a part of the cost of the improvement if the cost which they considered was more than enough to justify the assessment. *New England Hospital v. Street Commissioners*, 88.
4. Under St. 1892, c. 418, § 5, in regard to the laying out of highways in Boston the street commissioners of that city can make an order for the extension and widening of a street and later make a separate order for its construction. This was done by them in extending and widening Columbus Avenue under St. 1894, c. 418. *Held*, that the improvement was not completed until the work of construction was finished and the street was ready for use by the public, and this completion of the street having been within six years before the passage of St. 1902, c. 527, betterments could be assessed for the improvement under the terms of that act although the order for the extension and widening was passed more than six years before the passage of the act. *Ibid*.
  5. Under St. 1902, c. 527, which authorized the assessment within a year from the passage of that act of betterments for improvements completed by the city of Boston within six years from that date and was intended to authorize assessments for expenses wholly or in part illegal when incurred, an assessment, upon estates specially benefited to a greater amount than the assessment, is valid if it is less than one half of the amount legally expended for land damages, and in such a case it is immaterial whether a part of the additional expense for construction was incurred illegally or if so whether the acts illegal when performed were of a kind which the Legislature might have authorized. *Gardiner v. Street Commissioners*, 223.
- Certiorari will not issue to quash unconstitutional sewer assessment six years after assessment where acquiescence inferred, see CERTIORARI, 2.
- St. 1902, c. 527, is not invalid as authorizing two assessments for same improvement, see CONSTITUTIONAL LAW, 3.
- Pub. Sts. c. 50, § 7, (R. L. c. 49, § 5,) providing for sewer assessments, construed not to authorize assessment in excess of special benefit and so is constitutional, see CONSTITUTIONAL LAW, 2.

#### *On Foreign Corporations.*

6. St. 1903, c. 437, § 75, provides that every foreign corporation of certain classes shall pay an excise tax of one hundredth of one per cent on its authorized capital stock, "but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." *Held*, that where one hundredth of one per cent exceeds \$2,000 the amount of the local tax is to be deducted from the whole amount before it is reduced to \$2,000. *American Can Co. v. Commonwealth*, 1.
- St. 1903, c. 437, imposing excise tax on foreign corporations does not apply to corporations engaged solely in interstate commerce, but does apply to those engaged partly in domestic commerce and is constitutional, see CONSTITUTIONAL LAW, 12.



*Exemption as Charitable Institution.*

7. A corporation organized under Pub. Sts. c. 115, "to provide a home for working girls at moderate cost," having no capital stock, and none of the income or profits of its business being divided among its members, can be found to be a charitable institution within the meaning of R. L. c. 12, § 5, cl. 3, and its property therefore to be exempt from taxation under that clause. *Franklin Square House v. Boston*, 409.

*Arrest for Non-payment.*

8. For the purpose of making an arrest under R. L. c. 18, § 26, for non-payment of a tax, the collector has made reasonable search for goods on which to levy when he has requested the delinquent to exhibit goods upon which the levy may be made and the delinquent has refused or neglected to exhibit them. *Kerr v. Atwood*, 506.
9. In an action against a constable for alleged unlawful arrest under a tax warrant, if it does not appear that the defendant made a specific demand upon the plaintiff to exhibit goods upon which to levy before making the arrest, the return of the defendant upon the warrant that he made diligent search for and was unable to find goods of the plaintiff, although not conclusive, is *prima facie* evidence in favor of the defendant. *Ibid.*
10. In an action against a constable for alleged unlawful arrest under a tax warrant, if there is evidence that the plaintiff was arrested for non-payment of a tax after the defendant had made reasonable search for goods on which to levy, the questions whether on the facts shown there was unnecessary or improper delay in proceeding to the jail with the plaintiff or whether the plaintiff was subjected to improper treatment are for the jury. *Ibid.*

*Automobile.*

Fee required by St. 1903, c. 473, for registration of automobiles is license fee and not tax, see **LICENSE**.

**TIDE WATER.**

Section 2 of St. 1809, c. 95, authorizing the Lechmere Point Corporation created by that act to hold a certain tract of land, with power to make streets through it, divide it into lots and build walls to protect it from the water, and to manage and improve it according to the will and pleasure of the proprietors, contains no grant by the Commonwealth of a right to fill flats. *Scully v. Commonwealth*, 178.

**TRUST.***Creation.*

1. Where one of three owners in common of a tract of land, bought to be cut into lots to be put upon the market, conveys his share in fee to the other two for convenience in managing the property and making conveyances, the parties making an agreement in writing by which all three are to use their best skill and exertions in making sales of the land and the one conveying



Trust (continued).

his title is to receive from those holding the title a certain proportion of the proceeds from sales after the payment of all indebtedness and expenses, an express trust is created although the word "trust" is not used. *Sawyer v. Cook*, 163.

*Accounts of Trustees.*

2. The Superior Court under its general equity jurisdiction has authority to receive and pass upon the accounts of trustees and to make all proper orders and decrees concerning them. *Hayes v. Hall*, 510.
3. If a trustee, holding property under a will for the benefit of a married woman during her life and on her death for the benefit of her minor children, renders an account which is assented to by the beneficiary for life but is contested by the guardian *ad litem* of her minor children, and the Probate Court makes a decree disallowing in the account certain investments made in good faith by the trustee and ordering the trustee to restore to the trust from his own property the amount of the loss on the investments disallowed, although the beneficiary for life might have been found to have accepted the loss for herself by her assent to the account when presented, yet, after the decree disallowing the investments on the objection of the guardian *ad litem*, the account is no longer the one to which the beneficiary for life assented, and she is not estopped from claiming the full amount of interest as well as of principal to which she is entitled by the decree. *Bennett v. Pierce*, 186.

*Duties and Liabilities of Trustee.*

4. If one of several trustees of a trust created by deed does an act which makes him accountable to the beneficiaries for a loss suffered by the trust, and the act is done without the knowledge or consent of his co-trustees, his co-trustees are not chargeable with the loss if there was no fault or negligence on their part. *Hayes v. Hall*, 510.
5. If a trust fund includes a second mortgage on land of one of the trustees, and this trustee at a foreclosure of the underlying first mortgage procures a person to attend the sale and purchase the land for the wife of this trustee for \$150,000 when it is worth at least \$200,000 and a co-trustee brings a suit in equity electing to affirm the foreclosure and seeking to charge the trustee first mentioned with the difference between the purchase price and the value of the mortgaged property, it is a question of fact which properly may be determined by a master, whether the defendant trustee was acting solely at the request of his wife and merely as her messenger, she paying for the land out of her separate estate, or whether he was acting as his wife's agent for his own or her benefit to the detriment of the trust estate. In the last case he would be chargeable with the amount of the loss to the trust. *Ibid.*

*Liability of one dealing with Trustee.*

6. The fact that a trustee deposits a check payable to him as trustee in his personal account at a bank where he has no account as trustee gives the bank no reason to believe that the trustee is acting dishonestly, and if the



trustee fails to account for the proceeds of the check the beneficiary has no remedy against the bank. *Batchelder v. Central National Bank of Boston*, 25.

*Resulting.*

7. If a man buys and pays for a parcel of real estate and has it conveyed to a woman who is living with him as his housekeeper and whom he has agreed to marry as soon as his wife shall obtain a divorce from him, there is no presumption of a gift, and a resulting trust is created in favor of him who pays the purchase money, especially if the circumstances show that he does not intend to make a gift of the real estate to the person in whose name the title is taken. *Lufkin v. Jakeman*, 528.
8. In case of a resulting trust created by the payment of the purchase money for land the title of which is taken in the name of another person, the statute of limitations does not begin to run against the equitable owner until the holder of the title begins to hold adversely, and if nothing appears to the contrary the transaction itself implies a recognition of the rights of the equitable owner until repudiation. *Ibid*.
9. If a man buys and pays for a parcel of real estate and causes the title to be taken in the name of another person a resulting trust is none the less created because the object of the purchaser in having the title put in the name of the other person is to defeat any possible claim of his wife to alimony, especially where the purchaser is not insolvent and his wife is not in fact defrauded, as the enforcement of the trust in no way depends on the fraudulent purpose and does not require its proof. *Ibid*.

*Payment of Income.*

Pub. Sts. c. 186, § 24, (R. L. c. 141, § 24,) as to payment of income to beneficiary for life from decease of testator, does not apply to a trust created by agreement which is not a will or an instrument in the nature of a will, see WILL.

*Fiduciary Relation.*

Fiduciary relation of promoter of corporation and duties and liabilities in selling property to it, see CORPORATION, 5-8.

*Laches of Beneficiary.*

Failure of beneficiary to aid in certain enterprise in trust for twenty-one years held to be laches barring assignee from enforcing trust, see EQUITY JURISDICTION, 2.

TRUSTEE PROCESS.

Mortgaged personal property in the hands of a bailee of the mortgagor cannot be attached by summoning the bailee by trustee process. *Jenness v. Shrieves*, 70.

When defendant has been summoned as trustee of plaintiff in action previously brought plaintiff can recover interest only to date of service of trustee process on defendant, see INTEREST, 8.



### UNFAIR COMPETITION.

R. L. c. 56, § 1, making it a criminal offence to impose a condition in the sale of goods "that the purchaser shall not sell or deal in the goods . . . of any other person", does not prohibit a sale of goods by a manufacturer with an agreement to give a reasonable discount at the end of a certain period if during that period the purchaser has not dealt in goods of the same kind made by any other manufacturer. Whether, if the original price was made so high and the discount so large as virtually to require the buyer not to deal in the goods of others, the sale would come within the terms of the statute was not considered, nor was the question of the constitutionality of the statute. *Commonwealth v. Strauss*, 229.

### UTTERING FORGED INSTRUMENT.

See FORGERY.

### WAGERING CONTRACTS.

#### *Actual Purchases or Sales.*

1. Under St. 1901, c. 459, there can be no recovery of money paid as margins where the person employed to buy or sell securities makes, in accordance with the terms of the contract or employment, actual purchases or sales of the securities. *Allwright v. Skillings*, 538.

#### *Evidence in Defence.*

2. In an action against the members of a firm of brokers, under St. 1890, c. 437, as amended by St. 1901, c. 459, for money alleged to have been paid on wagering contracts, the defendants may show the general nature of the business done by the firm, that orders always were executed by actual purchases or sales and that there never were any fictitious purchases or sales. *Allwright v. Skillings*, 538.

#### *Effect of Release.*

3. Releases under seal attached to certain contracts relating to the purchase of stocks on margins, signed by the purchaser under a fictitious name in which he had been carrying on the transactions, releasing a stock exchange corporation from all demands on the contracts to which the releases were attached and also from any claim or demand under R. L. c. 99, "for any payment at any time heretofore made . . . either on within or any other contract or transaction whatever," are a bar to all claims of a similar character on accounts previously carried on by the signer under his own name although closed more than two years before, and it does not matter that when the releases were executed the officers of the corporation to whom they were made did not know that the person who executed them was the same person who carried on the former transactions, nor does it matter that at the time the releases were executed the person who signed them had brought an action under St. 1890, c. 437, to recover the margins paid on the former transactions and had obtained an auditor's report in his favor. *Klopot v. Metropolitan Stock Exchange*, 335.



### WAIVER.

Exceptions not argued are considered waived. *Swain v. Boston Elevated Railway*, 405.

Filing answer to merits waives right to set up matter in abatement, see PRACTICE, CIVIL, 4.

Failure to object to reference to auditor and appearing at hearing before him waives right to set up matter in abatement, see PRACTICE, CIVIL, 5.

Where party is allowed to amend on payment of costs on certain day, acceptance of costs by adversary on later day is waiver of right to object to allowance of amendment, see PRACTICE, CIVIL, 7.

Receipt of sworn statement of fire loss without objection held waiver of delay in rendering it, see INSURANCE, 3.

Failure of insurer to reply to certain letter of insured referring to representative of insurer no admission that he was its adjuster, see INSURANCE, 2.

Evidence found to show waiver of agreement to deliver goods in certain period, see CONTRACT, 2.

Statutory prohibition against issue of execution within twenty-four hours of judgment can be waived by debtor, see EXECUTION, 2.

Whether certain agreement by poor debtor is waiver of Pub. St. c. 171, § 15, as to issue of execution is question of law, see POOR DEBTOR, 1.

Right to object to statute as unconstitutional as violating vested rights may be waived, see CONSTITUTIONAL LAW, 6.

Certain agreement by landowner with city as to damages from taking and abandonment of land held to be waiver of right to object to constitutionality of statute authorizing abandonment, see CONSTITUTIONAL LAW, 8.

### WATER RIGHTS.

Language of express exception to taking under statutory authority held to include all rights to use land incident to use of waters, see DAMAGES, 2.

### WAY.

#### *Hancock Avenue not Public Street or Private Way.*

1. The foot walk or passageway eight feet in width at the west of the State House grounds in Boston called Hancock Avenue is not a public street or a private way within the meaning of St. 1892, c. 419, § 25, as amended by St. 1894, c. 443, § 9, restricting the height of buildings in Boston. *Perry v. Commonwealth*, 457.

#### *Highway by Prescription.*

2. If a private way laid out for the use of a farm and brickyard has been open to the public and has been used by the public to a certain extent, as shown by some cart ruts overgrown with grass leading to farm houses and by the fact that the public took advantage of the way being open to drive through it more or less, this is not enough, although covering a period of twenty years, to warrant a finding that the way has become a public highway by prescription. *Aikens v. New York, New Haven, & Hartford Railroad*, 547.



*Laying out of Highway.*

Where under St. 1892, c. 418, § 5, the order for the construction of a street is separate from and later than the order for its extension the public improvement is not completed within St. 1902, c. 527, until the construction is finished, see TAX, 4.

*Defect in Highway.*

3. For the purpose of establishing the liability of a city or town under the highway act a street remains open to travel until it has been closed by a vote of the proper authorities. *Jones v. Collins*, 53.
4. In actions against a contractor and against a city for injuries caused by the plaintiff tripping over an iron water shut-off twelve inches high and three or four inches in diameter protruding above the portion of a street where a sidewalk is to be constructed, if it appears that the contractor was constructing a new street laid out over an existing highway, doing the work under a permit from the superintendent of streets, called a permit to close, this shows that the street technically was not closed to travel by a vote of the proper authorities, and it is a question for the jury whether the contractor and the city have used reasonable care and diligence to protect the travelling public. If they have not, the contractor is liable for having created a nuisance in a public way in legal contemplation open to travel, and the city is liable under the highway act. *Ibid*.
5. To carry out the report of the commissioners appointed under St. 1900, c. 472, providing for the abolition of certain grade crossings in Fall River, the city council of that city authorized the mayor to designate in writing the streets to be closed temporarily and the length of time and the conditions under which they should remain closed. Acting under this order the mayor authorized the railroad company which was required by the commissioners to perform the work, to close a part of a certain street while it was being wrought to a new and lower grade. *Held*, that this did not relieve the city while the work of construction was going on from its obligation either to keep the street in reasonable repair for the use of travellers, or to give notice to the public by signs or barriers that it was closed. *Torphy v. Fall River*, 310.
6. In an action against a city for injuries from an alleged defect in a highway, if it appears, that a railroad company had been making a change of grade in the street under an order of commissioners appointed under a grade crossing act, that the mayor under authority from the city council had designated the street as one to be closed temporarily during the work of construction, that barriers with suitable signs were erected by the railroad company and subsequently were removed, leaving unguarded an open trench which had been dug for the purpose of lowering a water main, and that the plaintiff fell into the trench and was injured, there is evidence of a defect in the highway and of notice of the defect to the defendant. *Ibid*.
7. In an action against a city for injuries from an alleged defect in a highway, if it appears that the plaintiff was passing at night through an



unlighted street in which she knew that the work of lowering the grade of the street to carry it under the track of a railroad had been going on for some time, but that "it was finished for people to walk on it," and that the plaintiff was injured by falling into an open trench from which barriers had been removed, there is evidence for the jury that the plaintiff was in the exercise of due care. *Torphy v. Fall River*, 310.

8. In an action against a town for injuries alleged to have been caused by a defect in a highway, if there is evidence that the plaintiff was driving under a railway bridge which crossed the highway, that one half of the road was obstructed by dirt and materials placed there in the construction of a sewer, and that the plaintiff's team came in contact with a plank ten inches high, standing on edge and held in that position by dirt around it, projecting into the street so that teams going by would strike it, and if the plaintiff has testified that the road under the bridge was very dark, the questions whether the defect had existed so long that the town by the exercise of reasonable care and diligence might have had notice of it and was guilty of negligence in failing to remedy it, and whether the plaintiff was in the exercise of due care, are for the jury. *McCarthy v. Dedham*, 204.

#### Notice of injury.

9. The provision of R. L. c. 51, § 20, requiring notice of the time, place and cause of an injury from a defect in a highway is applicable only to an action brought for a failure to perform a duty imposed by statute of keeping the way in repair, and has no application to an action at common law against a person digging a pit in a highway and leaving it insufficiently or improperly filled. *Seltzer v. Amesbury & Salisbury Gas Co.* 242.
  10. The obligation of a gas light company under R. L. c. 110, § 76, to put streets which it has dug up "into as good repair as they were in when opened" does not oblige such a company to keep such highways in repair within the meaning of R. L. c. 51, § 20, and the requirement of that section as to notice of the time, place and cause of an injury from a defect in a highway does not apply to an action against a gas light company. *Ibid.*
- Service of notice of injury on selectman under R. L. c. 51, §§ 20, 21, see PRACTICE, CIVIL, 2, 3.

Negligence of one attempting to ride bicycle between wagon and excavation in street constituting defect, see NEGLIGENCE, 26.

#### *Conditions in Street Railway Location.*

Condition in street railway location as to maintenance and repair of highway held valid, see STREET RAILWAY, 6.

Selectmen may insert in street railway location condition as to repairs of public ways more onerous than imposed by general laws, see STREET RAILWAY, 5.

Under condition in street railway location providing for change in material of track, selectmen may order change in weight and kind of rails used, see STREET RAILWAY, 9.



Way (*continued*).

Provision of St. 1898, c. 578, § 18, confirming previous street railway locations, see **STREET RAILWAY**, 8.

Condition in street railway location as to reconstruction of track and roadbed with different material held valid, see **STREET RAILWAY**, 7.

Mandamus to compel city to construct or discontinue street, see **MANDAMUS**, 2.

Right to obstruct street with team for unloading merchandise must be exercised with regard for rights of others, see **NEGLECT**, 28.

When street legally closed to travel, see *ante*, 8, 4.

### WEST BOYLSTON.

Owner of farm selling surplus produce may be found to have "established business" within St. 1895, c. 488, see **DAMAGES**, 3.

### WIDOW.

Under R. L. c. 106, widow of employee can recover for his death only when instantaneous and without conscious suffering, see **NEGLECT**, 57.

### WILL.

#### *Attempted Modification by Agreement.*

More than a year after a will had been proved and allowed in this Commonwealth, a contest having arisen as to the validity of the residuary clause of the will leaving the remainder of the property of the testatrix to certain relatives, "in trust to devote the income to such charities as they see fit until they can no longer attend to the same," and then to "devote the entire sum, principal and interest, to the same purpose," the heirs at law and next of kin of the testatrix executed an agreement of compromise, confirmed by a decree in another jurisdiction assented to by them, by which it was stipulated that the residue should be paid to two of the trustees named in the will who should pay the net income to one of the next of kin named, quarter yearly, for and during her natural life, "such payments to be deemed a compliance with said trust." The beneficiary for life named in this agreement filed a petition, seeking to be paid the income of the trust fund from the death of the testatrix before the turning over of the fund to the trustees as well as afterwards, under the provisions of Pub. Sta. c. 136, § 24, (R. L. c. 141, § 24.) *Held*, that the compromise agreement in no way modified the will, and was not a will nor an instrument in the nature thereof within the meaning of the statute, so that the provisions of the statute could not apply, and that under the agreement itself the petitioner was entitled to no more, as it gave her only the income of the fund turned over to the trustee under the agreement. *Hastings v. Nesmith*, 180.

#### *Proof.*

Verdict of jury in probate appeal on issues of fact submitted to them is conclusive if not set aside, see **EQUITY PLEADING AND PRACTICE**, 8.



*Construction.*

For construction of wills, see DEVISE AND LEGACY.

## WIRES.

St. 1888, c. 221, extended the rights to cut telegraph and telephone wires given by Pub. Sts. c. 109, § 17, to the cutting of electric light wires, see ELECTRIC LIGHT COMPANY, 1.

As to negligence of one injured by contact with electric light wire hanging over gutter of street, see NEGLIGENCE, 82.

Negligence in failing to mend break in electric light wire hanging over street, see NEGLIGENCE, 81.

Negligence in insulating electric light wires running through trees, see NEGLIGENCE, 80.

## WITNESS.

*Impeachment.*

1. In an action of tort against a railway company for personal injuries, a witness who had testified for the plaintiff was asked on cross-examination whether the signature to a paper, containing questions and answers relating to the accident and signed with his name and address, was his. He said that it was not and in answer to a further question testified that the answers to the questions on the paper were not in his handwriting. He then at the request of the defendant's counsel wrote in open court his name and address in the words in which they appeared on the paper. The defendant then offered the paper in evidence for the purpose of allowing the jury to compare the handwriting on the paper with that of the witness done in their presence, in order that if they found that the signature and the answers to the questions were written by him they might consider the inconsistency of the answers with his testimony as bearing on his credibility. The judge refused to admit any portion of the paper except the signature and address, and, upon the defendant refusing to separate the signature and address from the questions and answers, excluded the whole paper, and ruled that it could not be submitted to the jury for the purpose of impeaching the witness. *Held*, that the exclusion and the ruling were not sufficient ground for sustaining an exception. *Jacobs v. Boston Elevated Railway*, 245.

Where witness is attacked on ground that his testimony is recent fabrication it may be shown that he made the same statements earlier, see EVIDENCE, 17.

Inconsistent statements used by party to action under R. L. c. 175, § 24, to impeach his own witness are not evidence of truth of matter stated, see EVIDENCE, 16.

*Cross-examination.*

2. In an action for personal injuries prosecuted after the death of the plaintiff by the administrator of her estate, to recover at common law for the suffering of the intestate from the time of the accident to the time of her



*Witness (continued).*

death, where the defendant contends that the intestate during this period was suffering and finally died from pulmonary tuberculosis, it is within the discretion of the presiding judge to exclude on the cross-examination of the mother of the intestate, a witness for the plaintiff, questions put for the purpose of eliciting from her a statement that others of her children had died from pulmonary tuberculosis, especially where the substance of the evidence excluded afterwards is admitted in another form. *Dickinson v. Boston*, 505.

*Refreshing Recollection.*

8. A witness may be permitted to refresh his recollection from books of original entry although the books themselves would not be admissible in evidence. *Allwright v. Skillings*, 538.

*Expert.*

Examination and qualification of experts, see EVIDENCE, 4-8.

WORCESTER.

City not liable for negligence in establishing sewage system under St. 1886, c. 381, see MUNICIPAL CORPORATIONS, 2.

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- "Assume." See *Commonwealth v. Lavery*, 13, 14.  
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 "Criminal case." See *Hurley v. Commonwealth*, 443, 445.  
 "Established business." See *Allen v. Commonwealth*, 59, 61.  
 "Presume." See *Commonwealth v. Lavery*, 13, 14.  
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WRIT.

*Service.*

Service at last and usual place of abode not good if defendant temporarily absent from Commonwealth, see PRACTICE, CIVIL, 1.

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# STATUTES.

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